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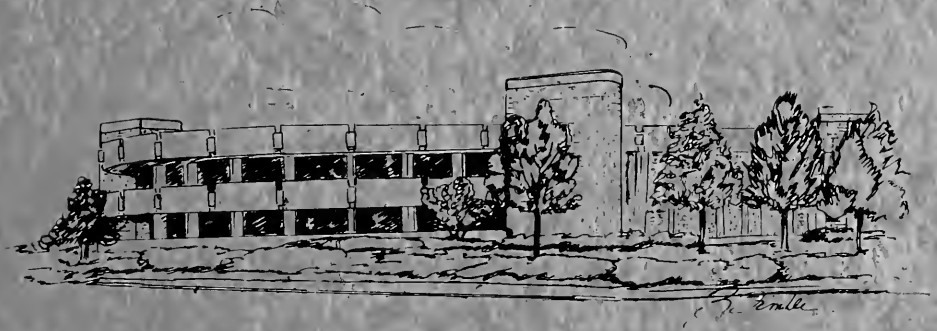

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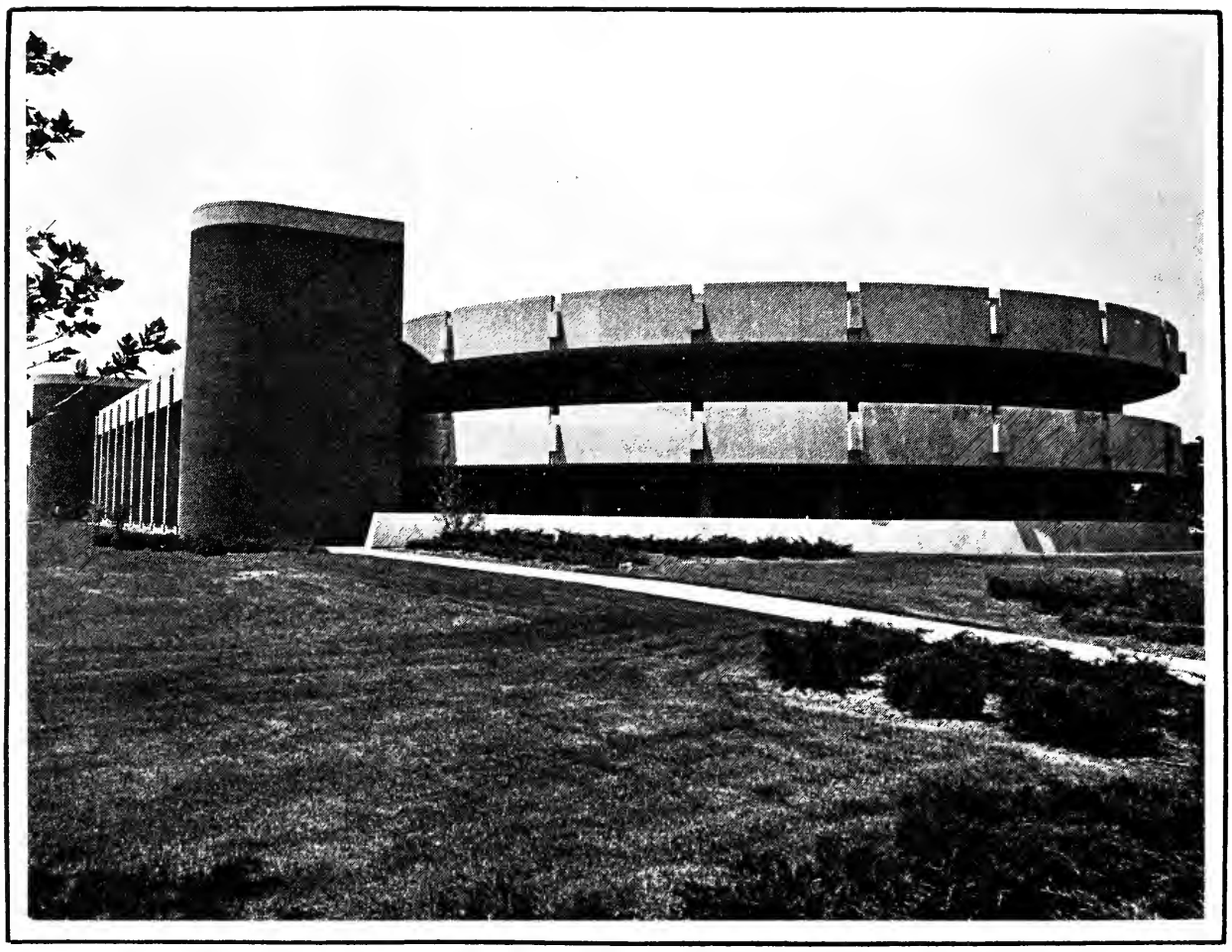

Indiana Law Review

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Implementing the Indiana Juvenile Code

SHARON FUNCHEON MURPHY*

The new Indiana Juvenile Code, enacted in 1978,[1] has been the subject of substantial legislative revision and significant judicial interpretation. This Article updates and analyzes the major changes which have occurred since the juvenile code became effective in 1979.[2] The affected provisions of the juvenile code that are discussed in this Article include: Chapter 1—General Provisions; Chapter 2—Jurisdiction; Chapter 3—Rights and Effect of Adjudication; Chapter 4—Delinquent Children and Children in Need of Services; Chapter 5—Termination of the Parent-Child Relationship; Chapter 6—Paternity; and Chapter 7—Procedure in Juvenile Court.

I. GENERAL PROVISIONS

Chapter one of the juvenile code (code) contains general provisions regarding purposes and policies of the juvenile law in Indiana.[3] These provisions act as a guide for the application of the other provisions of the code. The policy and purpose section of the code focuses on the diverse and often conflicting rights and obligations of society, families, and juveniles to each other. It seeks to balance the various obligations involved while protecting "constitutional and other legal rights of children and their parents."[4] Several recent Indiana decisions address these interests in two different areas: decisions that concern the effective date of the code, and decisions that deal with the remedies against and rights of juveniles provided in other chapters of the code.

The new juvenile code took effect October 1, 1979.[5] Specifically,

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*Sharon Funcheon Murphy, Associate Editor of the *Indiana Law Review*, prepared this Article in collaboration with John Schneider, John Polivick, Cindy Williams, Beth Kerlin, Chris Wall, Pam Rhine, Tom Grebb, Jay Kennedy.

[1]Act of Mar. 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196 (codified at IND. CODE §§ 31-6-1-1 to -10-4 (Supp. 1978)).

[2]Act of Mar. 10, 1978, Pub. L. No. 136, § 59, 1978 Ind. Acts 1196 (1978).

[3]IND. CODE § 31-6-1-1 (Supp. 1981).

[4]*Id.* § 31-6-1-1(2).

[5]Act of Mar. 10, 1978, Pub. L. No. 136, § 59, 1978 Ind. Acts 1196 (1978).

the code was not to apply to "matters in which a court has entered a dispositional decree before October 1, 1979 . . . ."[6] Some confusion arose about the time the new code was to take effect regarding the scope of "matters" to which the code would apply. The issue has been resolved in two different contexts.

The court of appeals in both *In re Miedl*[7] and *In re Myers*[8] applied the new code in proceedings to terminate parental rights in cases in which the children concerned had been made wards of the state prior to the effective date of the code. The court in both cases found that the wardship proceedings were separate "matters" from the termination proceedings for the purpose of applying the code. Therefore, the new juvenile code was applicable to the termination proceedings, because no dispositional decree was entered in that matter prior to October 1, 1979.[9]

In another context, the court of appeals in *Washington County Department of Public Welfare v. Konar*[10] found that a petition to terminate parental rights, which was filed by the Washington County Welfare Department well before the effective date of the code, had to comply with the new code because no dispositional decree had been entered before the new code became applicable.[11] In upholding the trial court's determination to grant the motion to dismiss the Welfare Department's petition, the court of appeals cited *Miedl* as holding that the new code applies to matters still pending.[12] The court further noted that the Welfare Department should have

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[6]*Id.*

[7]416 N.E.2d 491 (Ind. Ct. App.), *rev'd on other grounds*, 425 N.E.2d 137 (Ind. 1981). *Miedl* was primarily concerned with the sufficiency of evidence in support of the trial court's termination of the parent-child relationship which will be discussed under the Chapter 5 section of this Article. The court of appeals reversed the trial court's determination, suggesting that the new code required a different standard than was previously necessary and that the evidence was insufficient under the new code.

The Indiana Supreme Court reversed the finding that there was insufficient evidence to support the trial court's determination. 425 N.E.2d at 138. The court noted that the standards set down in Perkins v. Allen County Dep't of Pub. Welfare, 170 Ind. App. 171, 352 N.E.2d 502 (1976) as well as the standards espoused by the new code were met in *Miedl*. Therefore, the trial court's determination was correct under both the old and new law. 425 N.E.2d at 140. While the court did not address the issue of which law applied to the termination proceedings, it did warn against subjecting the trial court's judgment to a "seesaw-tug of war" between the two statutes. *Id.*

[8]417 N.E.2d 926 (Ind. Ct. App. 1981).

[9]*In re* Myers, 417 N.E.2d at 929; *In re* Miedl, 416 N.E.2d at 493-94. The court's holding in *Miedl* was based on the belief that the legislature intended the code to affect the rights of children in the juvenile justice system as soon as possible. 416 N.E.2d at 493-94.

[10]416 N.E.2d 1334 (Ind. Ct. App. 1981).

[11]*Id.* at 1335.

[12]*Id.*

known of the impending changes in the applicable law and conformed its petition to the provisions of the new code.[13] In determining that the new code was applicable to "matters" still pending, the court, in the above cases, noted that the policy and purpose section of the code was an explication of the legislature's intention.

One recent Indiana decision employed the policy and purpose section of the code in an attempt to balance the rights of a juvenile affected by the juvenile justice system with the interests of the state in the effective operation of that system. In *Madaras v. State*,[14] the court of appeals noted that "[o]f primary importance to the policies behind our juvenile justice system is the flexibility the system provides in dealing with juvenile problems."[15] The court noted that the code favors disposing of juvenile matters in the least severe manner available, but the flexibility in dealing with juvenile problems created by the code allows a juvenile court to choose an alternative best suited to the unique circumstances of a particular case.[16] In effect, it appears that a court is free to impose any available disposition if it is in the best interest of the child and society. A dispositional decree may not, however, be purely punitive in nature, because such a punitive decree would violate the spirit and purpose of the code.[17]

Numerous alternatives are thus available under the code for the resolution of problems to ensure that the ultimate resolution is in the best interest of the child. This "best interests" standard, present in the purpose and policy section of the code,[18] pervades the other chapters of the code and acts as a guide for the application of other code provisions. At the point where the best interests of the child interfere with the integrity of the family unit, serious constitutional questions arise. However, this best interests standard as an underlying policy of the code has been held constitutional.[19]

In re Joseph[20] dealt with a challenge of the best interests standard by a father whose visitation rights with his daughter were terminated because the visitation rights were found not to be in the best interests of the child. The father attacked the best interests standard as meaningless and claimed that the standard could be used to advance a less than compelling state interest while interfering with his fundamental rights to family integrity and parent-child

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[13]*Id.*
[14]425 N.E.2d 670 (Ind. Ct. App. 1981).
[15]*Id.* at 672.
[16]*Id.* at 671.
[17]*See* IND. CODE § 31-6-1-1 (Supp. 1981).
[18]*Id.* § 31-6-1-1(6).
[19]*In re* Joseph, 416 N.E.2d 857 (Ind. Ct. App. 1981).
[20]*Id.*

communication.[21] The thrust of the father's argument was that the standard violated due process.[22]

The court of appeals held that the standard was not meaningless because the standard had not been employed to "make vague moral judgments about alternative lifestyles and parental fitness."[23] The court found that the purpose for the standard, contrary to the father's contention, was to preserve an environment conducive to the mental and physical development of the child.[24] The father also opposed the best interests standard by arguing that reasonable visitation rights should be granted absent a showing that such rights would pose a substantial threat to the child's emotional or physical well-being.[25] The court of appeals held, however, that the best interests standard was constitutionally permissible in determining visitation rights of a father when, as in the case before the court, the child has been found to be neglected and dependent under Indiana law.[26]

The court acknowledged that there is a fundamental right to family integrity and that the state cannot interfere with this right unless a compelling state interest is advanced.[27] The court found, however, that the required compelling state interest was advanced by the two-step process evinced in the case before the court.[28]

The first step is the initial state intrusion into the family unit pursuant to the state's *parens patriae* power "to intervene when parental neglect, abuse or abandonment has been established."[29] The court then found that the compelling state interest in protecting the welfare of the child was clear.[30] Once the finding of abuse and neglect has been made, the second step is to balance the rights of the biological parent with the best interests of the child, keeping in mind that the rights of the biological parent are no longer paramount once the initial step has been properly taken.[31] By the time the best interests standard is liberally applied in the second stage, the state has already demonstrated the requisite compelling interest and courts may then fashion a remedy most conducive to the emotional and physical development of the child.

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[21]416 N.E.2d at 858-60.
[22]*Id.*
[23]*Id.* at 861.
[24]*Id.*
[25]*Id.* at 858.
[26]*Id.* at 862.
[27]*Id.* at 859.
[28]*Id.* at 860.
[29]*Id.*
[30]*Id.*
[31]*Id.*

II. JURISDICTION

Indiana Code section 31-6-2-4, which provides for waiver of jurisdiction by the juvenile court, was amended in 1981 to accommodate the addition of subsection (d) to section 31-6-2-4.[32] The amendment also added subsection (e) which compels the juvenile court to waive jurisdiction, upon proper motion by the prosecutor, if it finds that the offender is charged with a felony[33] and has previously been convicted of either a felony or a non-traffic misdemeanor.[34]

Waiver of jurisdiction by the juvenile court was recently addressed by the Supreme Court of Indiana in *Trotter v. State*.[35] The defendant in that case was a seventeen-year-old juvenile who was arrested for murder, robbery, and theft. The juvenile court waived jurisdiction pursuant to subsection 31-6-2-4(c), which provides for waiver when there is probable cause to believe that a child, at least ten years of age, has committed murder. The defendant appealed his murder conviction, contending that there must be proof beyond a reasonable doubt that he committed the offense before a waiver could be effectuated. The defendant also argued that the juvenile court committed error by failing to make a statement of specific reasons to justify the waiver as is required by subsection 31-6-2-4(h).[36] The Indiana Supreme Court rejected these arguments, reasoning that such a high standard of proof would effectively turn a waiver hearing into a trial on the merits of the case.[37] All that must be shown is that the act would be murder if committed by an adult and that there is probable cause to believe that the offender committed the act when he was over ten years of age.[38] When these standards are met, the statute "creates a presumption of waiver with respect to juveniles charged with murder."[39]

In *Strosnider v. State*,[40] a minor was tried as an adult for attempted burglary of a dwelling, burglary, criminal trespass, and criminal mischief. The juvenile court waived jurisdiction pursuant to subsection 31-6-2-4(b), finding that the defendant was beyond rehabilitation under the juvenile system. The defendant appealed his convictions alleging, *inter alia*, that there was no probable cause

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[32]IND. CODE § 31-6-2-4(d) (Supp. 1981).
[33]*Id.* § 31-6-2-4(e)(1).
[34]*Id.* § 31-6-2-4(e)(2).
[35]429 N.E.2d 637 (Ind. 1981).
[36]*Id.* at 642.
[37]*Id.* at 641.
[38]*Id.* at 642.
[39]*Id.*
[40]422 N.E.2d 1325 (Ind. Ct. App. 1981).

to support the charge of attempted burglary, and that the waiver was therefore improper.[41]

A mandatory waiver under subsection 31-6-2-4(d) requires a showing of probable cause that the juvenile offender committed at least a class B felony. Although attempted burglary of a dwelling is a class B felony, that charge against the defendant was dropped. Instead, the defendant was charged with and convicted of burglary, a class C felony. Thus, the defendant argued, the juvenile court's waiver could not be sustained.[42] The court of appeals affirmed his convictions, holding that even if there was not probable cause to charge the defendant with attempted burglary, the juvenile court could make a discretionary waiver based upon the defendant's prior record of numerous juvenile offenses.[43]

The court apparently relied upon subsection 31-6-2-4(b) which allows the juvenile court discretionary waiver of its jurisdiction when a child of at least fourteen years of age commits an act that is heinous or aggravated, or commits a repetitive pattern of delinquent acts, and the child is beyond rehabilitation under the juvenile system.[44] When these requisites are met, the juvenile court *may* waive its jurisdiction if it also finds that the interests and safety of the community would be best served if the juvenile were tried as an adult.[45]

For adoption proceedings, the Indiana Court of Appeals made it clear in the case of *In re Gray*[46] that juvenile courts do not have exclusive, original jurisdiction. The court noted that a juvenile court may terminate a parent-child relationship when the action stems from an adjudication that the child was delinquent or in need of services.[47] However, to adopt a child outside of the provisions of section 31-6-2-1, the prospective parent must comply with the procedural steps of section 31-3-1-6 and must file the action in a probate court pursuant to section 31-3-1-1.[48]

Several amendments were added to section 31-6-2-1 that further limited the jurisdiction of the juvenile court.[49] One change was a 1981 amendment, subsection (b)(1), which added a provision that ex-

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[41]*Id.* at 1326.

[42]*Id.*

[43]*Id.* at 1329.

[44]*Id.* at 1327, 1329.

[45]IND. CODE § 31-6-2-4(b) (Supp. 1981).

[46]425 N.E.2d 728 (Ind. Ct. App. 1981).

[47]*Id.* at 729 n.2. *See* IND. CODE § 31-6-2-1(a)(3).

[48]425 N.E.2d at 729. Judge Hoffman's concurring opinion played down the distinction between a juvenile court and a probate court, but he agreed with the court's reversal based on lack of notice to the biological mother. *Id.* at 730-31.

[49]*See* Kerr, *Foreword: Indiana's New Juvenile Code*, 12 IND. L. REV. 1 (1979).

cepts from the jurisdiction of the juvenile court any traffic law violation committed by a juvenile unless the violation is a felony or a violation of section 9-4-1-54.[50] As a result, the juvenile courts do not have jurisdiction over children sixteen years of age or older for violating traffic laws, unless the violation is of Indiana's drunk driving statute,[51] or the violation constitutes a felony.[52]

The same 1981 amendment to section 31-6-2-1 added subsection (d) which precludes juvenile court jurisdiction over an individual sixteen years or older who allegedly commits murder,[53] kidnapping,[54] rape,[55] or robbery,[56] if the act was committed while the offender was armed with a deadly weapon,[57] or if the act resulted in bodily injury.[58] Subsection (d) further provides that the juvenile court does not acquire jurisdiction in the circumstances mentioned above, even though the offender pleads guilty to or is convicted of a lesser included offense.[59]

III. Rights and Effect of Adjudication

Indiana Code section 31-6-3-4[60] gives the juvenile court power to appoint a guardian ad litem. Active consideration of such an appointment was recently characterized as a duty in the special circumstances surrounding a paternity suit. In *Crayne v. M.K.R.L.*,[61] the trial court did not consider appointment of a guardian ad litem before entering judgment against an infant who appeared at trial only with his mother.[62] The Indiana Court of Appeals reversed the judgment, noting that "it *is mandatory* that the trial judge *consider* the *necessity* of appointing a guardian ad litem before permitting a minor defendant to proceed without one."[63]

This conclusion rests upon the special applicability of the Indiana Rules of Trial Procedure to paternity actions.[64] Trial Rule 17(C)

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[50]Ind. Code § 31-6-2-1(b)(1) (Supp. 1981).

[51]*Id.* § 9-4-1-54.

[52]*Id.* § 31-6-2-1(b)(1).

[53]*Id.* § 31-6-2-1(d)(1).

[54]*Id.* § 31-6-2-1(d)(2).

[55]*Id.* § 31-6-2-1(d)(3).

[56]*Id.* § 31-6-2-1(d)(4).

[57]*Id.* § 31-6-2-1(d)(4)(A).

[58]*Id.* § 31-6-2-1(d).

[59]*Id.*

[60]Ind. Code § 31-6-3-4 (Supp. 1981). For a brief discussion of the positive aspect of this provision, see Griffis, *A Judicial Response to the New Juvenile Code*, 54 Ind. L. J. 639, 649 (1979).

[61]413 N.E.2d 311 (Ind. Ct. App. 1980).

[62]*Id.* at 312-13.

[63]*Id.* at 313 (emphasis in the original).

[64]*Id.* at 313-14. Ind. Code § 31-6-6.1-19 (Supp. 1981) provides that paternity actions shall be governed by the Indiana Rules of Trial Procedures.

provides that the court shall appoint a guardian ad litem for an infant not represented or not adequately represented.[65] Although the appellate court found that the appointment of a guardian ad litem is not mandated by Trial Rule 17(C), it reasoned that considerations of justice and the protection of minors necessitate consideration of such an appointment.[66] The court tempered its conclusion by suggesting that if a minor were adequately represented at trial, failure to consider the appointment of a guardian ad litem might be harmless.[67] The court, however, did not define "adequately"; the court merely suggested that "enthusiastic" representation would be considered a sufficient criterion.[68]

The necessity of considering appointment of a guardian ad litem in non-paternity actions against a juvenile was not addressed by the court. Because the court based its conclusion upon Trial Rule 17(C) which is not applicable to criminal proceedings, this decision is apparently limited to civil suits against juveniles. It remains to be determined whether the duty to consider the appointment of a guardian ad litem is expanded beyond the special circumstances of a paternity suit.

IV. DELINQUENT CHILDREN AND CHILDREN IN NEED OF SERVICES

Chapter four[69] of the 1978 juvenile code outlines juvenile court proceedings for delinquents and children in need of services.[70] This chapter redefines children who had been considered neglected under the previous code as children in need of services (CHINS),[71] and outlines new procedures to care for these children.[72] Since 1978, when the current juvenile code was adopted,[73] the Indiana General Assembly has continued to refine the CHINS provisions.[74] The courts, however, have only had limited opportunities to review and interpret these provisions.[75]

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[65]IND. R. TR. P. 17(C).

[66]413 N.E.2d at 313-14.

[67]*Id.* at 314.

[68]*Id.*

[69]IND. CODE §§ 31-6-4-1 to -19 (Supp. 1981).

[70]*See* Kerr, *supra* note 49, at 9-20.

[71]IND. CODE ANN. § 31-6-4-3 commentary at 112-13 (West 1979); Kerr, *supra* note 49, at 11, 12. For the definition of a neglected child under the old juvenile code, see IND. CODE § 31-5-7-6 (1976) (repealed 1978).

[72]*See* Kerr, *supra* note 49, at 9-20. *See* IND. CODE §§ 31-6-4-4, -6, -6.5, -8, -10, -11, -12, -13.5 to -19 (Supp. 1981).

[73]The juvenile code was enacted by Act of Mar. 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196 (codified at IND. CODE §§ 31-6-1-1 to -10-4 (Supp. 1981)).

[74]*See, e.g.*, notes 76-89 *infra* and accompanying text.

[75]*See* notes 90-129 *infra* and accompanying text.

A. Legislative Refinements Concerning CHINS

The most significant action taken by the Indiana General Assembly in regard to the CHINS provisions affects the definition of a child in need of services.[76] When the juvenile code was adopted, a child in need of services was defined as including: a child whose physical or mental health was impaired due to a lack of life's basic necessities; a child whose physical health was endangered due to the act or omission of his parents, guardian, or custodian; and a child who endangered his own health or the health of another.[77] In 1979, the legislature expanded the definition to include children who were victims of sex crimes, children who were allowed by parent, guardian, or custodian to participate in obscene performances, and children who were allowed to commit sex offenses.[78] These definitional provisions were added to tie the CHINS provisions to the child abuse provisions of the juvenile code.[79]

After the definition of a child in need of services was expanded to include the described acts of child abuse, the administrator of the Indiana Department of Public Welfare sought from the attorney general an official interpretation of the CHINS definitional provision, Indiana Code subsection 31-6-4-3(a)(3).[80] The attorney general elaborated on the definition of a child who is a victim of a sex offense.[81] The attorney general indicated that under this subsection, a child in need of services includes a child who has been sexually abused by *anyone*, including, but not limited to, a parent, guardian, or custodian.[82] Thus, the attorney general, following the precedent set by the legislature, interpreted broadly the definition of CHINS and, as a result, expanded the juvenile court's jurisdiction.

While broadening the CHINS definition during its 1979 session, the legislature also took a step toward limiting the application of CHINS by adding subsection 31-6-4-3(d).[83] Subsection 3(d) creates a rebuttable presumption that a child is not a child in need of services if the parent, guardian, or custodian fails to provide specific medical

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[76]*See* IND. CODE § 31-6-4-3(a) (Supp. 1981).

[77]Act of Mar. 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196, 1204 (1978) (codified at IND. CODE § 31-6-4-3(a)(1), (2), (6) (Supp. 1981)).

[78]Act of Apr. 11, 1979, Pub. L. No. 276, § 13, 1979 Ind. Acts 1379, 1387 (1979) (codified at IND. CODE § 31-6-4-3(a)(3)-(5) (Supp. 1981)).

[79]IND. CODE ANN. § 31-6-4-3 commentary at 113 (West 1979).

[80]79 Op. Att'y Gen. 89 (1979).

[81]IND. CODE § 31-6-4-3(a)(3) (Supp. 1981) provides that a child is "a child in need of services" if before his eighteenth birthday "he is the victim of a sex offense under IC 35-42-4-1 [Rape], IC 35-42-4-2 [Unlawful Deviate Conduct], IC 35-42-4-3(a), IC 35-42-4-3(b) [Child Molesting], IC 35-42-4-4 [Child Exploitation], IC 35-45-4-1 [Public Indecency], IC 35-45-4-2 [Prostitution], or IC 35-46-1-3 [Incest]."

[82]79 Op. Att'y Gen. at 90.

[83]*See* Act of Apr. 11, 1979, Pub. L. No. 276, § 13, 1979 Ind. Acts 1379, 1388; IND.

treatment for the child because of legitimate and genuine religious belief. Although a juvenile court may order treatment for the child, unless the presumption created by subsection 3(d) is overcome, this action may not be the basis for declaring the child to be a child in need of services and for implementing CHINS procedures allowing the state to step in as *parens patriae*. Shifting the burden of proof under subsection 3(d), therefore, limits the jurisdiction of the state in this particular situation.

Prior to 1980, in order for a child to be classified as a child in need of services, it was necessary to show that the child came within one of the six categories of need.[84] It was also necessary to show that the child needed care, treatment, or rehabilitation that he was not receiving, that he was unlikely to accept voluntarily, and that he was unlikely to accept or be provided with unless the court intervened.[85] In 1980, however, the legislature dropped this latter requirement for showing a child to be in need of services.[86] This definitional amendment was in accord with the 1979 legislature's move

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CODE ANN. § 31-6-4-3(d) commentary at 113-14 (West 1979). IND. CODE § 31-6-4-3(d) (Supp. 1981) provides:

> When a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of his religious beliefs, a rebuttable presumption arises that the child is not a child in need of services because of such a failure. However, this presumption does not prevent a juvenile court from ordering, when the health of a child requires, medical services from a physician licensed to practice medicine in Indiana.

[84]*See* Act of Apr. 11, 1979, Pub. L. No. 276, § 13, 1979 Ind. Acts 1379, 1387 (1979).

[85]*Id.* Prior to 1980, Indiana Code section 31-6-4-3(a) read as follows:

> Sec. 3.(a) A child is a child in need of services if before his eighteenth birthday:
> (1) his physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of his parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision;
> (2) his physical or mental health is seriously endangered due to injury by the act or omission of his parent, guardian, or custodian;
> (3) he is the victim of a sex offense under IC 35-42-4, IC 35-45-4-1, or IC 35-46-1-3;
> (4) his parent, guardian, or custodian allows him to participate in an obscene performance defined by IC 35-30-10.1-3 or IC 35-30-10.1;
> (5) his parent, guardian, or custodian allows him to commit a sex offense prohibited by IC 35-45-4; or
> (6) he substantially endangers his own health or the health of another;
> *and needs care, treatment, or rehabilitation that he is not receiving, that he is unlikely to accept voluntarily, and that is unlikely to be provided or accepted without the coercive intervention of the court.*

Id. (emphasis added)

[86]Act of Mar. 3, 1980, Pub. L. No. 182, § 5, 1980 Ind. Acts 1576, 1581 (1980) (deleting the former concluding provision following clause 6).

toward opening the door for CHINS proceedings. In 1981, however, the legislature reinserted the previously deleted paragraph in the definition. As a result, it is again necessary to prove that a child will not receive the needed treatment without the court's intervention.[87]

In 1981, the General Assembly again limited and refined the definition of CHINS by adding subsection 31-6-4-3(e) to the definitional section.[88] Subsection 3(e) states that reasonable corporal punishment administered by a parent, guardian or custodian to discipline a child is *not* controlled by the CHINS statute. This subsection and subsection 3(d) emphasize the policy that the CHINS chapter should not be used to limit the lawful practice or teaching of religious beliefs.[89]

From the 1981 amendments it appears that if the legislature was attempting to expand the scope of CHINS adjudication in 1979 and 1980, it has limited the scope of CHINS in 1981.

B. Court Application and Interpretation of CHINS

The most significant case decided thus far under the CHINS provisions is *Wardship of Nahrwold v. Department of Public Welfare of Allen County*.[90] In *Nahrwold*, a caseworker, acting on information from an anonymous source, went to the Nahrwold residence and found eight-year-old Stefanie Nahrwold at home alone. After questioning Stefanie and examining her for evidence of physical abuse, the caseworker took Stefanie into custody.[91] The next day a hearing was held under subsection 31-6-4-6(e) to determine whether the court had probable cause to keep the child in custody.[92]

At the hearing, the child's mother, Betty Nahrwold, requested a written record and an opportunity to present witnesses. The trial court denied both motions noting that the hearing was merely an informal hearing to establish probable cause rather than a fact-finding adjudication.[93] The trial court first heard testimony from Stefanie, Betty Nahrwold, and the caseworker, and then determined that if Betty would agree to an informal adjustment, the court would

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[87]Act of May 5, 1981, Pub. L. No. 266, § 5, 1981 Ind. Acts 2182, 2187 (1981).

[88]*Id.*

[89]IND. CODE § 31-6-4-3(e) (Supp. 1981). Subsection 3(e) provides that "[n]othing in this chapter limits the right of a person to use reasonable corporal punishment when disciplining a child if the person is the parent, guardian, or custodian of the child. In addition, nothing in this chapter limits the lawful practice or teaching of religious beliefs."

[90]427 N.E.2d 474 (Ind. Ct. App. 1981).

[91]*Id.* at 476.

[92]*Id.*

[93]*Id.*

release Stefanie to her.[94] Betty consented to the adjustment and regained custody of the child. Then Betty appealed the decision of the trial court,[95] claiming that the restriction on presenting witnesses denied her due process and that the consent to the adjustment was coerced.

On appeal, the Third District Court of Appeals affirmed the judgment of the trial court.[96] The court held that neither the chapter four statutory scheme nor the fourteenth amendment due process clause required the court to allow a parent to present witnesses or have a written record at a probable cause hearing for detention pursuant to Indiana Code subsection 31-6-4-6(e).[97] The statutory scheme did not require a written record because the trial court decided to release the child.[98] According to the statutory scheme, there was no right to present witnesses at the detention hearing because that opportunity would be available in subsequent fact-finding proceedings,[99] such as the initial hearing on the petition to declare the child to be a child in need of services.

The court also found that although Betty's parental rights had undoubtedly been affected, due process requirements did not provide her with the opportunity to present witnesses at a probable cause hearing.[100] In reaching this conclusion, the court noted that the due process rights of alleged criminals do not include a right to an adversary hearing when determining probable cause for arrest and incarceration. The court concluded that the due process clause does not require a parent to be given a full adversary hearing when probable cause for temporary custody of a child is being adjudicated.[101]

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[94]427 N.E.2d at 476.

[95]*Id.*

[96]*Id.* at 481.

[97]*Id.* at 477-81.

[98]*See id.* at 476; IND. CODE § 31-6-4-6(e), (f) (Supp. 1981). Subsections 6(e) and 6(f) read as follows:

> (e) If the child is not released, a detention hearing must be held within seventy-two (72) hours (excluding Saturdays, Sundays, and legal holidays) after he is taken into custody; otherwise he shall be released . . . .
>
> (f) The juvenile court shall release the child to his parent, guardian, or custodian; however, *the court may order the child detained if it makes written findings of fact upon the record* of probable cause to believe that the child is a child in need of services . . . .

Id. (emphasis added). The language of subsection 6(f) indicates that a written record is only required when the court decides to detain the child. The reason for this distinction between decisions to release and decisions to detain could be that an appeal is more likely when a court has decided to detain a child.

[99]*See* 427 N.E.2d at 480; IND. CODE § 31-6-3-2(a) (Supp. 1981) (noting the rights of parents in subsequent proceedings).

[100]427 N.E.2d at 479.

[101]*Id.* at 480.

At first glance, the court's analysis may appear logical; however, it breaks down when the different standards of proof in each type of subsequent adversary hearing are considered. In criminal adversary proceedings, the state is required to prove that the accused is guilty beyond a reasonable doubt, but in proceedings concerning the parent-child relationship, the state was required to prove its case only by a preponderance of the evidence.[102] Since subsequent parent-child proceedings require a lesser standard of proof than criminal proceedings, it is arguable that the preliminary probable cause proceedings for temporary custody of a child should require greater procedural safeguards to protect parents' rights.

Although the state's burden of proof in detention hearings and later fact-finding hearings is minimal,[103] the burden will be easier for the state to meet at detention hearings if the opponents do not have an opportunity to present witnesses. The unfairness in allowing the state to make its case without adversarial confrontation at detention hearings is that the state may establish probable cause for detention and then use the detention ruling as evidence in subsequent fact-finding hearings to establish its best interest burden of proof. If the probable cause determination may be used against the parent in subsequent proceedings where a non-criminal burden of proof is required, the parent should have a right to the same due process at the time of the probable cause hearing that he has in the subsequent hearings. Providing parents with greater due process assurances through each step of a CHINS proceeding is the best way to ensure that the parent will receive due process in the later hearings which may culminate in the termination of a parent-child relationship.[104]

Betty also claimed that she was coerced into signing the consent to an informal adjustment program.[105] The appellate court acknowledged that the trial court made Betty's custody of Stefanie contingent upon Betty's agreement to the informal adjustment, but said that Betty had other options available to her and thus was not coerced.[106] Betty could have refused to sign the consent, thereby

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[102]Puntney v. Puntney, 420 N.E.2d 1283, 1285-86 (Ind. Ct. App. 1981) (citing IND. CODE § 31-6-7-13(a) (Supp. 1979)).

[103]*See* Myers v. Jennings County Dep't of Pub. Welfare, 417 N.E.2d 926, 931 (Ind. Ct. App. 1981) (terminating parent-child relationship by the best interest of child standard); *In re* Fries, 416 N.E.2d 908, 910 (Ind. Ct. App. 1981) (terminating parent-child relationship by best interest of child standard); *In re* Joseph, 416 N.E.2d 857, 859-61 (Ind. Ct. App. 1981) (upholding constitutionality of best interest standard in determining parental visitation rights of biological father).

[104]For an example of how the state may use past proceedings to prove that it is in the child's best interest to terminate the parent-child relationship, see *In re* Miedl, 425 N.E.2d 137 (Ind. 1981), *rev'g* 416 N.E.2d 491 (Ind. Ct. App. 1981).

[105]427 N.E.2d at 480.

[106]*Id.*

temporarily giving up custody of Stefanie in order to obtain unconditional custody through the remaining CHINS procedures, or to petition for a writ of habeas corpus.[107]

Judge Staton wrote an insightful dissent in which he claimed that the statutory scheme required the trial court to provide Betty Nahrwold with a full hearing.[108] Judge Staton noted that by making Betty's custody conditional upon her agreement to an informal adjustment, the hearing was really determining whether the parent should participate in a program of care or treatment. Therefore, according to Indiana Code section 31-6-3-2, Betty Nahrwold was entitled to introduce evidence on her behalf.[109] Although Judge Staton presents a persuasive argument, the hearing referred to in subsection 31-6-3-2(b)(2) is actually the hearing discussed in section 31-6-4-17.[110] That section requires the filing of a petition for participation *before* the hearing. It also presumes that the child has already been adjudicated a child in need of services.[111] That section was not, however, applicable to Stefanie Nahrwold's case. Her case had not yet progressed to the point where section 31-6-4-17 would be of any import.

Judge Staton also noted that by requiring Betty to participate in a program of informal adjustment, the court was in essence requiring her to admit that Stefanie was a child in need of services.[112] Judge Staton pointed out that such an admission could be devastating in later proceedings, such as in a proceeding to terminate parental rights. Judge Staton did not, however, draw the logical conclusion from these circumstances; that is, by requiring the parent to agree to an informal adjustment or to forego custody temporarily, the court is placing parents in a no-win situation. If the parent agrees to an informal adjustment, the parent risks a fatal admission; if the parent does not agree, the failure to agree to conditional custody could be interpreted in later proceedings as evidence that the parent is indifferent, uncaring, and "unmotherly."[113] Although Judge Staton's construction of the statutory scheme is subject to question, he did make a strong argument for reversing the trial court on the basis of its coercion in obtaining Betty Nahrwold's agreement to the informal adjustment.[114]

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[107]*Id.*

[108]427 N.E.2d at 481 (Staton, J., dissenting).

[109]*Id.*

[110]*Compare* IND. CODE § 31-6-3-2(b)(2) (Supp. 1981) *with* IND. CODE § 31-6-4-17 (Supp. 1981).

[111]IND. CODE § 31-6-4-17 (Supp. 1981).

[112]427 N.E.2d at 482.

[113]For examples of how courts interpret the actions of parents in making decisions, see Puntney v. Puntney, 420 N.E.2d at 1285-87; *In re* Fries, 416 N.E.2d at 909-11.

[114]*See* 427 N.E.2d at 481-83.

In summary, *Nahrwold* indicates that the courts will probably be lenient in determining the adequacy of due process safeguards in detention hearings pursuant to subsection 31-6-4-6(e).[115] *Nahrwold* also provides support for the practice of conditioning parental custody upon agreement to informal adjustment programs.[116] In addition to these specific holdings of *Nahrwold*, the case could stand for the general proposition that the appellate courts will continue to give broad discretion to trial courts despite the specific procedural guidelines provided in the statute for reviewing CHINS cases.[117] Judge Staton's strong dissent, however, indicates that rubber-stamping trial court decisions may not become a pattern under the CHINS provisions.[118]

The Indiana Supreme Court also had occasion to review the new CHINS provisions in the case of *In re Lemond*.[119] *Lemond* involved a child custody battle under the Uniform Child Custody Jurisdiction Act (UCCJA).[120] According to the divorce decree, Earl Lemond was to have custody of his daughter Michelle as long as he lived in Hawaii; if he moved, however, the child was to stay with her mother in Hawaii. Lemond moved to Indiana. When his daughter visited him in Indiana, he refused to return her to her mother in Hawaii.[121] The mother filed a petition for a writ of habeas corpus to have the child returned, and the Supreme Court of Indiana ordered the writ enforced.[122] As a last resort to maintain the custody of his daughter, the father filed a petition alleging that Michelle Lemond was a child in need of services.[123] The Indiana Supreme Court refused to exercise its emergency jurisdiction under the UCCJA and re-open the provisions of the Hawaiian divorce decree in this case because the CHINS petition was filed in bad faith and had no merit.[124] The court seemed to indicate, however, that the emergency powers under the UCCJA could be invoked if a valid CHINS petition was filed.[125]

Earl Lemond also claimed that the court had emergency jurisdiction under the CHINS statutes without invoking the emergency jurisdiction provisions of the UCCJA.[126] In dicta, the court stated that it could invoke the emergency jurisdiction pursuant to the

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[115]*See id.* at 477-80.
[116]*See id.* at 480.
[117]*See id.* at 476-80.
[118]*See id.* at 481-83 (Staton, J., dissenting).
[119]413 N.E.2d 228 (Ind. 1980).
[120]IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1981).
[121]413 N.E.2d at 231.
[122]*Id.* at 232.
[123]*See id.* at 233.
[124]*See id.* at 244-45.
[125]*See id.* at 245.
[126]*Id.*

CHINS statutes, but in order to do so, the procedures described in the statute must be followed exactly.[127] The court then reviewed the procedures of the CHINS statute and referred to them as "jurisdictional prerequisites."[128] The court's careful treatment of these provisions indicates that the court may follow the procedures outlined in the CHINS statutes very closely when reviewing cases in the future. At least this will be the standard of review when a CHINS claim appears to be made in bad faith.[129]

C. *Judicial Consideration of Delinquent Children Provisions*

In *In re Tacy*,[130] the court of appeals determined when a petition alleging delinquency must be "filed" for purposes of tolling the twenty day limitation on detention of a child.[131] The appellant argued that the petition alleging delinquency was filed April 18, 1980, so that the waiver hearing which occurred twenty-eight working days later on May 28, 1980, was untimely. An ambiguity arose in view of a statutory mandate directing the juvenile court to "authorize" the filing of a petition.[132] In *Tacy*, the juvenile court had authorized the filing of the petition alleging delinquency on April 29, 1980, resulting in a timely waiver hearing on May 28, 1980.[133] The court recognized the issue as one of first impression and called upon the general rules of statutory construction.[134] Because the authorization by the

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[127]*Id.* at 245-47.

[128]*Id.* at 245-49.

[129]*See id.* at 249.

[130]427 N.E.2d 919 (Ind. Ct. App. 1981).

[131]IND. CODE § 31-6-7-6(b) (Supp. 1981) provides:

If the child is in detention and a petition has been filed, either a fact-finding hearing or a waiver hearing must be commenced within twenty (20) days (excluding Saturdays, Sundays, and legal holidays) after the petition is filed. If the child is not in detention, the hearing must be commenced within sixty (60) days (excluding Saturdays, Sundays, and legal holidays) after the petition is filed.

[132]IND. CODE § 31-6-4-9 (Supp. 1981) provides in part:

(a) The prosecutor may request the juvenile court to authorize the filing of a petition alleging that a child is a delinquent child; the attorney for the county department may request the juvenile court to authorize the filing of a petition alleging that a child is a delinquent child defined by section 1(b)(2) of this chapter. The person requesting the authorization shall represent the interests of the state at this proceeding and at all subsequent proceedings on the petition.

(b) The juvenile court shall consider the preliminary inquiry and the evidence of probable cause. The court shall authorize the filing of a petition if it finds probable cause to believe that the child is a delinquent child and that it is in the best interests of the child or the public that the petition be filed.

[133]427 N.E.2d at 921.

[134]*Id.*

juvenile court of the filing of the petition alleging delinquency had traditionally been an essential step in the juvenile process,[135] the court concluded that "it only seems logical that the 'filing' of the petition alleging delinquency does not actually occur until it is authorized by the juvenile court."[136] Thus, the juvenile court had acted within the twenty day period and had not lost jurisdiction.

The appellant next argued that the failure to hold a detention hearing within the forty-eight hour period following his arrest, and the failure to release him after the forty-eight hour period[137] constituted error.[138] The court agreed with the appellant that there had clearly been no hearing within forty-eight hours but went on to hold, without citation to authority, that such error was harmless. The court, again without citation to authority, reasoned that the statute in question required only the child's release and was silent as to effect on jurisdiction and charges. As a result, should a child be detained beyond the forty-eight hour period in contravention of the explicit statutory mandate, the juvenile court will not lose jurisdiction, nor will the charges against the juvenile be dismissed.[139] The court concluded by stating: "Tacy's detention was regrettable; however, he was not without recourse. His proper remedy under the circumstances would have been to seek a writ of habeas corpus."[140] In reaching its holding, the court seemed to ignore the prophylactic intent of the statute. While a juvenile may have a remedy available in the form of a writ of habeas corpus, the court's opinion disregards the express language of the statute and apparently allows a child to be retained beyond the forty-eight hour period set by the statute.

V. TERMINATION OF THE PARENT-CHILD RELATIONSHIP

In Indiana, the termination of the parent-child relationship is governed by two distinct statutes. If the termination is in connection with an adoption, the adoption statute[141] applies, but if the termination is a result of abandonment, neglect, or abuse, the juvenile code[142] applies. Both statutes outline different requirements for vol-

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[135]*Id.* (citing Duty v. State, 169 Ind. App. 621, 623; 349 N.E.2d 729, 731 (1976)).

[136]427 N.E.2d at 921. *See also* Kerr, *Foreword: Indiana's New Juvenile Code*, 12 IND. L. REV. 1, 14-15 (1979) (discussing the initiation of formal action).

[137]IND. CODE § 31-6-4-5(f) (Supp. 1981) provides in part: "If the child is not released, a detention hearing must be held within forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) after he is taken into custody; otherwise he shall be released."

[138]427 N.E.2d at 921.

[139]*Id.*

[140]*Id.*

[141]IND. CODE § 31-3-1-6 (Supp. 1981).

[142]*Id.* § 31-6-5-4.

untary and involuntary terminations thus providing four different sets of requirements for termination.[143]

Chapter five of the juvenile code sets out the requirements for both voluntary and involuntary terminations. Voluntary termination necessarily requires parental consent, and the code explicitly states that a valid, informed consent must be given. The consenting parents must give their consent *in court* after being advised of their parental rights and of the effect that a termination will have on those rights.[144] If the parents do not attend the hearing on the petition to terminate, the relationship can still be terminated if the court finds that: "(1) the parents gave their consent in writing before a person authorized by law to take acknowledgements; (2) they were notified of their constitutional and other legal rights and of the consequences of their actions under section 3 of this chapter; and (3) they failed to appear."[145]

This third requirement implicitly gives parents the right to recant a written consent any time before a court ruling is entered on the termination petition by simply attending the hearing and refusing to give consent in court.[146] Such parental refusal to give consent would then force the agency seeking termination to proceed under the involuntary termination provisions.

To terminate the parent-child relationship involuntarily under the juvenile code, the child must first have been adjudicated a delinquent child or a child in need of services.[147] In addition to this requirement, the petitioner must show further that:

> (1) the child has been removed from the parent for at least six (6) months under a dispositional decree;
> (2) there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied;
> (3) termination is in the best interest of the child; and
> (4) the county department has a satisfactory plan for the care and treatment of the child.[148]

Although these requirements are strict, the new code has lowered the standard of proof which must be met from "clear and

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[143]*See id.* §§ 31-3-1-6(a), (g) & 31-6-5-2, -4.

[144]*Id.* § 31-6-5-2(c), (d).

[145]*Id.* § 31-6-5-2(c).

[146]*See* Washington County Dep't of Pub. Welfare v. Konar, 416 N.E.2d 1334, 1335 (Ind. Ct. App. 1981); Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 205 (1981).

[147]IND. CODE §§ 31-6-5-3(6)(A), -4(1) (Supp. 1981). *See* notes 76-89 *supra* and accompanying text.

[148]Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350.

convincing" to a "preponderance of the evidence."[149] Prior to the new code, Indiana courts had held that the higher, intermediate level of proof was proper due to the fact that a fundamental right was being affected.[150] However, the Indiana legislature has provided that the lower "preponderance of the evidence" standard will be applied in juvenile proceedings unless the adjudication of a crime is involved.[151]

The parent in *Puntney v. Puntney*[152] questioned the constitutionality of this change in standards, but the court did not resolve the issue because the question had not been raised at the trial court level and could not, therefore, be raised on appeal.[153] The court dealt with the problem in dicta, however, and stated that this was a civil case requiring the ordinary standard of proof, a preponderance of the evidence.[154] The court stated that the clear, cogent, convincing standard of proof announced in *In re Adoption of Bryant*[155] and *In re Adoption of Anonymous*[156] was changed by the new provision in the code.[157]

The court might well have deferred to the reasoning of *In re Joseph*[158] in addressing this issue. In that case the "preponderance of the evidence" standard was applied when a parent was denied visitation rights under the code. When the standard was challenged as being insufficient because the fundamental right to visitation was being affected, the court reasoned that once a child has been found to be in need of services, the parents' fundamental right to visita-

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[149]IND CODE § 31-6-7-13(a). It is important to note, however, that a recent United States Supreme Court decision, Santosky v. Kramer, 102 S. Ct. 1388 (1982), may render this section of the code unconstitutional. In *Santosky*, the New York law in dispute allowed the State to terminate parental rights upon a finding that the child was "permanently neglected." The New York courts required only a preponderance of the evidence to support this finding. The Supreme Court held that the due process clause of the fourteenth amendment requires that the proof be at least by clear and convincing evidence. *Santosky* was recently followed in Indiana in the case of Ellis v. Knox County Dep't of Pub. Welfare, 433 N.E.2d 847 (Ind. Ct. App. 1982).

[150]*See In re* Adoption of Anonymous, 158 Ind. App. 238, 302 N.E.2d 507 (1973). *But see In re* Leckrone, 413 N.E.2d 977 (Ind. Ct. App. 1980) (applying the same high standard to an involuntary termination in connection with an adoption proceeding after the effective date of the new juvenile code).

[151]IND. CODE § 31-6-7-13(a) (Supp. 1981).

[152]420 N.E.2d 1283 (Ind. Ct. App. 1981).

[153]*Id.* at 1286.

[154]*Id.*

[155]134 Ind. App. 480, 189 N.E.2d 593 (1963).

[156]158 Ind. App. 238, 302 N.E.2d 507 (1973).

[157]420 N.E.2d at 1286. *But see In re* Leckrone, 413 N.E.2d 977 (Ind. Ct. App. 1980); Graham v. Starr, 415 N.E.2d 772 (Ind. Ct. App. 1981) (both cases applying the clear and convincing standard to "post juvenile code" adoption cases).

[158]416 N.E.2d 857 (Ind. Ct. App. 1981).

tion is outweighed by the state's compelling interest in the welfare of the child.[159] This analysis would not change the standard of proof announced in the adoption cases cited by the court. Involuntary termination proceedings initiated under the adoption statute[160] would continue to require "clear and convincing" evidence because of the fundamental parental right involved. Only the cases initiated under the juvenile code that necessarily concern a delinquent child or a child in need of services would apply a "preponderance of the evidence" standard.

In the 1981 case *Puntney v. Puntney*,[161] the children involved in the involuntary termination proceeding had been adjudicated dependent and neglected children under the old juvenile code.[162] Permanent wardship was established at that time. In 1980, the county welfare department petitioned the court to terminate the parent-child relationship. The parent claimed that the new code requires a prior adjudication that the children were in need of services,[163] and since the department had failed to return to court under the new code and get such adjudication, it was barred from proceeding under the code.[164] The parent further contended that the new code does not apply to matters in which the court has entered a dispositional decree before October 1979.[165] The court held that the permanent wardship under the old code was equivalent to an adjudication of a child in need of services under the code and that the termination proceeding was a new and separate matter, thus making the new code applicable in this case.[166]

In *In re Miedl*,[167] the Indiana Supreme Court affirmed the trial court decision and vacated the appellate court's reversal. In *Miedl*, the two children involved in the termination proceeding had been wards of the county for most of their lives due to their mother's inability to care for them. The mother had constant and continuing mental and emotional problems and could not retain a job or maintain a home.[168] In February of 1979, the trial court issued an informal order that the children be returned to the mother for a trial period. When the mother entered the hospital in May, the children were returned to their foster parents and the trial period was deemed a

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[159]*Id.* at 858-59.
[160]IND. CODE § 31-3-1-6(g) (Supp. 1981).
[161]420 N.E.2d 1283 (Ind. Ct. App. 1981).
[162]*Id.* at 1284.
[163]*See* IND. CODE § 31-6-5-3(6)(A) (Supp. 1981).
[164]420 N.E.2d at 1284.
[165]*Id.*
[166]*Id.* at 1285.
[167]425 N.E.2d 137 (Ind. 1981).
[168]*Id.* at 138-39.

failure.[169] On May 30, the mother filed for termination of the wardship, and in response, the county filed for termination of the parent-child relationship.

The trial court granted the county's petition to terminate the parent-child relationship, but the appellate court reversed the decision.[170] The court based its reversal on the statutory requirement that "the child has been removed from the parent for at least six (6) months under a dispositional decree . . . ."[171] The court interpreted this to mean *physical* removal for the "six months *immediately preceding* the filing of the petition."[172] Since the mother had the children for two of the previous six months, the requirement was not met and the termination could not be granted. In refusing to accept this interpretation, the Indiana Supreme Court stated: "Not only had the children been removed from their mother for *much* of the previous six months but they had been under the care and supervision of the Welfare Department for most of their lives."[173] The court further stated that "[c]ustody had not changed in the orders of the court to give the mother physical custody. This was merely a temporary unofficial placement . . . ."[174] The court emphasized, as an additional requirement, that such terminations be in the best interests of the children involved,[175] but that it was "not the intention of the legislature that the future plans for the children would be detailed in the evidence so that the Court could choose the 'best' alternative for the children involved."[176] Prior to determining the future of the child, "it must first be found that the circumstances are such that the parental tie must be severed and a different direction found that gives some chance to the child . . . ."[177]

In re Myers[178] is another case in which the new code was applied in termination of parental rights. In *Myers*, the mother's two sons were adjudged to be children in need of services and placed in foster homes because the mother had failed to properly care for them.[179] In the sixteen months following this adjudication, the mother failed to hold a steady job, joined the air force but was discharged for medical reasons, and attempted suicide.[180] At the time

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[169]*Id.* at 139.
[170]*In re* Miedl, 416 N.E.2d 491 (Ind. Ct. App.), *rev'd*, 425 N.E.2d 137 (Ind. 1981).
[171]Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350.
[172]416 N.E.2d at 494.
[173]425 N.E.2d at 140 (emphasis added).
[174]*Id.*
[175]*See* Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350.
[176]425 N.E.2d at 141.
[177]*Id.*
[178]417 N.E.2d 926 (Ind. Ct. App. 1981).
[179]*Id.* at 927.
[180]*Id.* at 928.

of the hearing to terminate her parental rights, she was pregnant and living in a halfway house. At the hearing, she expressed her love for her children but stated that she was not prepared to assume parental duties.[181] The trial court terminated the mother's parental rights and she appealed the decision.[182]

The court of appeals evaluated the sufficiency of the evidence using the five criteria set out in the 1981 amendments to the code.[183] In assessing the probability that the conditions which resulted in the removal of the children would not be remedied, the second criterion set out in the code, the court stated that "[a]lthough there is no direct testimony that conditions will not be remedied, we find that such a conclusion could be reasonably inferred from the evidence presented."[184]

The court of appeals in *Myers* was also called upon to interpret the third criterion in the 1981 amendments to the code; what constitutes "reasonable services" to assist a parent in fulfilling his parental obligations.[185] The court stated that "what constitutes 'reasonable services' is one that cannot be answered by a definitive statement. Instead, it must be answered on the basis of any given factual situation, for it is clear that services which might be reasonable in one set of circumstances would not be reasonable in a different set of circumstances."[186]

Puntney, *Myers*, *Joseph*, and *Miedl* indicate that the courts will adhere to the requirements of the code while retaining a certain flexibility. This approach will allow a case-by-case determination in this sensitive area of termination of parental rights. The fundamental consideration applicable in this area is the best interests of the children involved.

VI. PATERNITY

A. Presumption of Legitimacy

The code[187] provides that if a child is born while the mother is married, the husband is presumed to be the father.[188] The statutory

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[181]*Id.*

[182]*Id.*

[183]IND. CODE § 31-6-5-4 (Supp. 1981).

[184]417 N.E.2d at 930.

[185]IND. CODE § 31-6-5-4(3) (Supp. 1981). This statute has been superseded by Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350 which is effective September 1, 1982.

[186]417 N.E.2d at 931.

[187]IND. CODE §§ 31-6-6.1-1 to -19 (Supp. 1981).

[188]IND. CODE § 31-6-6.1-9 (Supp. 1981) provides in part that:

(a) A man is presumed to be a child's biological father if:

presumption has been interpreted as merely the codification of the common law as it existed prior to the passage of the code.[189] Although the presumption is rebuttable, Indiana courts have called the presumption of legitimacy "one of the strongest known to the law and may only be rebutted by direct, clear, and convincing evidence."[190]

Since the passage of the code, there have been several cases decided which elucidate the type of evidence which is required to rebut the presumption.[191] In *Tarver v. Dix*,[192] the mother brought a paternity suit to have the defendant, Tarver, adjudicated the father of her child. At the time her child was born, the mother was married to another man. Although her husband lived in the same city, the mother testified she had not seen him for years and at the time of conception she had had sexual intercourse exclusively with Tarver.[193] Evidence was presented that the only men seen entering her apartment during the time of conception were Tarver and her brother. Tarver argued that this evidence did not rebut the presumption of legitimacy because the mother's husband lived in the same city and thus had access to his wife.[194] Past Indiana decisions had held that in order to overcome the presumption it would have to

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(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) he and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage is void . . . or voidable . . . and the child is born during the attempted marriage or within three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or

(3) after the child's birth, he and the child's biological mother marry, or attempt to marry, each other, by a marriage solemnized in apparent compliance with the law, even though the marriage is void . . . or voidable . . . and he acknowledged his paternity in a writing filed with the registrar of vital statistics of the Indiana state board of health or with a local board of health.

[189]Tarver v. Dix, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981).

[190]H.W.K. v. M.A.G., 426 N.E.2d 129, 131 (Ind. Ct. App. 1981).

[191]H.W.K. v. M.A.G., 426 N.E.2d 129 (Ind. Ct. App. 1981); Tarver v. Dix, 421 N.E.2d 693 (Ind. Ct. App. 1981); Johnson v. Ross, 405 N.E.2d 569 (Ind. Ct. App. 1980).

[192]421 N.E.2d 693 (Ind. Ct. App. 1981).

[193]*Id.* at 694.

[194]*Id.* at 697. The court in *Tarver* cited the case of Phillips v. State *ex rel.* Hathcock, 82 Ind. App. 356, 145 N.E. 895, (1925) which stated that:

[T]he presumption could be overcome by proof that the husband was impotent; or that he was entirely absent so as to have had no access to the mother; or was entirely absent at the time the child in the course of nature must have been begotten; or was present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse.

Id. at 360, 145 N.E. at 897.

be shown that the husband did not have access to his wife.[195] Access means physical access to and sexual intercourse with the wife during the time conception occurred. In view of the trial court's findings that the mother had not seen her husband during the time of conception,[196] the *Tarver* court concluded that the legal presumption of legitimacy had been overcome by clear and convincing evidence.

The *Tarver* court placed great emphasis on the fact that there was corroborating evidence to the mother's testimony.[197] However, in *H.W.K. v. M.A.G.*[198] the only testimony presented was by the mother and the alleged father. The court of appeals examined the long stated rule that "statements and admissions made by the parties standing alone are insufficient to rebut the presumption of legitimacy"[199] and found that this rule only applied to cases in which "the husband had access to the mother during the period of conception."[200] In cases where the evidence is uncontradicted that the husband did not have access to or sexual relations with the mother, the court held that the parties' statements standing alone may rebut the presumption of legitimacy.[201] The alleged father then argued that the evidence presented was insufficient to sustain the trial court's determination that he was the father. The court of appeals responded that "[p]aternity actions are civil proceedings and the alleged father must be proved to be such by a preponderance of the evidence."[202]

The code also provides that a man is presumed to be the biological father of the child if "he acknowledges his paternity in writing with the registrar of vital statistics of the Indiana State Board of Health or with a local board of health."[203] The case of *Johnson v. Ross*[204] illustrates the strength of this presumption. In *Johnson* both the mother and the alleged father testified that he was not the father.[205] Furthermore, the alleged father testified that he was out of the country and did not return to the United States

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[195]421 N.E.2d at 696.

[196]*Id.* at 697.

[197]*Id.* at 696.

[198]426 N.E.2d 129 (Ind. Ct. App. 1981).

[199]*Id.* at 132 (citing L.R.F. v. R.A.R., 269 Ind. 97, 378 N.E.2d 855 (1978); Buchanan v. Buchanan, 256 Ind. 199, 267 N.E.2d 155 (1971)).

[200]426 N.E.2d at 132.

[201]*Id.*

[202]*Id.* at 133 (citing Beaman v. Hedrick, 146 Ind. App. 404, 225 N.E.2d 828 (1970)). The court in *H.W.K.* held that the mother's testimony that she had had sexual relations only with the alleged father, coupled with the probability of conception at such time, was sufficient to support the trial court's finding. 426 N.E.2d at 133.

[203]IND. CODE § 31-6-6.1-9(b)(2) (Supp. 1981).

[204]405 N.E.2d 569 (Ind. Ct. App. 1980).

[205]*Id.* at 572.

during the period of conception.[206] However, he failed to testify that the mother did not come to see him during this time.[207] Therefore, the court of appeals refused to reverse the trial court's determination of paternity.[208] This result indicates that the presumption created by this section of the code appears to be nearly irrebuttable.[209]

B. Statute of Limitations

As a general rule, a paternity proceeding must be filed within two years after the child is born.[210] The code, however, provides several exceptions to the two year requirement.[211] One exception is when the alleged father provides support for the child; this support payment extends the statute of limitations until two years after support payments are discontinued.[212] The court of appeals in *H.W.K. v. M.A.G.*[213] placed the burden of showing that support had been furnished within two years of the filing of the paternity proceedings on

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[206]*Id.* at 570 n.2.

[207]*Id.*

[208]*Id.* at 573.

[209]The court in *Johnson* noted that it could not reverse if there was any set of facts or inferences which would sustain the trial court's determination. *Id.* at 572. The court went on to say that the trial court could reasonably infer that the putative father was the biological father from the fact that he had signed the affidavit acknowledging that he was the father. *Id.* at 573.

[210]IND. CODE § 31-6-6.1-6(a) (Supp. 1981).

[211]IND. CODE § 31-6-6.1-6(a) (Supp. 1981) provides in part that:

> Except for an action filed by the state department of public welfare or the county department of public welfare under subsection (c), the mother, a man alleging to be the child's father, the state department of public welfare, or the county department of public welfare must file an action within two (2) years after the child is born, unless: (1) both the mother and the alleged father waive the limitation on actions and file jointly; (2) support has been furnished by the alleged father or by a person acting on his behalf, either voluntarily, or under an agreement with: (A) the mother; (B) a person acting on the mother's behalf; or (C) a person acting on the child's behalf; (3) the mother, the state department of public welfare, or the county department of public welfare, files a petition after the alleged father has acknowledged in writing that he is the child's biological father; (4) the alleged father files a petition after the mother has acknowledged in writing that he is the child's biological father; (5) the petitioner was incompetent at the time the child was born; or (6) a responding party cannot be served with summons during the two (2) year period. A petition must be filed within two (2) years after any of the above conditions ceases to exist.

[212]IND. CODE § 31-6-6.1-6(a)(2) (Supp. 1981). *But cf.* Mills v. Harbluetzel, 102 S. Ct. 1549, 1557-58 (1982) (O'Connor, J., concurring) (implicitly questioning the constitutionality of such a provision).

[213]426 N.E.2d 129 (Ind. Ct. App. 1981).

the party who seeks the advantage of this exception.[214] Apparently, the alleged father must provide little support in order to fall within this exception. In *H.W.K.*, the burden was sustained by a showing that the father had furnished forty dollars for the child's support and had purchased various items of clothing.[215]

C. Support

After the trial court finds that the "man is the child's biological father, the court shall . . . conduct a hearing to determine the issues of support, custody, and visitation."[216] The court of appeals in *Tarver v. Dix*[217] found that the trial court committed reversible error by failing to conduct such a hearing.[218] Absent a hearing, the trial court judge could not have determined properly the amount of support the father should provide.[219]

The court of appeals in *Tarver* found that the trial court acted improperly by imposing upon Tarver a one year suspended sentence and probation for failure to secure bond to guarantee performance of the support obligation.[220] Although the code provides that the trial court can require the posting of a bond,[221] it does not authorize probation or a jail sentence for failure to comply. The proper procedure for the trial court to enforce its order for a bond is for the judge to utilize his contempt power.[222]

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[214]*Id.* at 133.

[215]*Id.* at 135.

[216]IND. CODE § 31-6-6.1-10(a) (Supp. 1981).

[217]421 N.E.2d 693 (Ind. Ct. App. 1981).

[218]*Id.* at 698.

[219]*Id.* IND. CODE § 31-6-6.1-13(a) (Supp. 1981) provides in part that:

> The court may order either or both parents to pay any reasonable amount for child support after considering all relevant factors, including the following: (1) the financial resources of the custodial parent; (2) the standard of living the child would have enjoyed had the parents been married and remained married to each other; (3) the physical and mental condition of the child and his educational needs; and (4) the financial resources and needs of the noncustodial parent.

[220]421 N.E.2d at 698.

[221]IND. CODE § 31-6-6.1-14 (Supp. 1981) provides: "The court may require that the parent obligated to make support payments provide appropriate security, bond, or other guarantee to insure that he will fulfill his obligation." The prior statute, IND. CODE § 31-4-1-22 (1971) (repealed 1978), provided in part:

> On failure to furnish such bond the court may commit the father to jail for not more than one (1) year. . . . Instead of committing the father to jail, or as a condition of his release therefrom, the court may commit him to a probation officer, upon such terms and conditions regarding payments and personal reports as the court may direct.

[222]421 N.E.2d at 698.

D. Change of Name

The court of appeals in *D.R.S. v. R.S.H.*[223] was presented with the issue of whether a child's surname could be changed in a paternity proceeding against the wishes of one of the parents.[224] In a split decision, the majority opinion held that in cases where the "natural father acknowledges and supports his child born out of wedlock, takes an interest in the child's welfare, and is not guilty of such wrongdoing as would render retention of his name positively deleterious to the child" the trial court judge would not abuse his discretion by giving the child his father's surname.[225] Both the concurrence[226] and the dissent[227] in *D.R.S.*, however, stated that the standard for this issue should be the best interests of the child.

The best interests of the child standard was applied in *J.L.A. v. T.B.S.*[228] The court of appeals in *J.L.A.* recognized that the trial court judge had "the power to order the surname of an illegitimate child changed, however, to do so the court must determine such a change is in the best interest of the child."[229] In *J.L.A.*, the trial court judge had said that the general rule is that if the father pays support, the surname of the child will be changed "to that of the father in the absence of good reasons shown to the contrary."[230] The court of appeals reversed and remanded the case to the trial court, stating that the correct standard would be "whether the change is in the best interest of the child."[231] The majority listed several factors which will help determine what is in the best interest of the child. First, the name by which the child is currently known; second, the convenience of keeping or changing the child's name; third, whether the child owns property, and if so, under what name the property is held; fourth, whether any confusion would result if the child's name were to be changed; and finally, if the child is old enough to offer a reasoned preference, the name the child desires.[232]

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[223]412 N.E.2d 1257 (Ind. Ct. App. 1980).

[224]For a discussion of the case, see Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 222-23 (1982).

[225]412 N.E.2d at 1266. The majority emphasized that the father has a significant "interest in having his child bear the paternal surname in accordance with tradition." *Id.* at 1263. Also, if the child bears his mother's maiden name, then there is a "fair indication that the child is illegitimate." *Id.* (quoting Petition of Harris, 236 S.W.2d 426, 429 (W. Va. 1977)).

[226]412 N.E.2d at 1266-67 (Sullivan, J., concurring).

[227]*Id.* at 1267 (Shields, J., dissenting).

[228]430 N.E.2d 433 (Ind. Ct. App. 1982).

[229]*Id.*

[230]*Id.* at 434.

[231]*Id.*

[232]*Id.* n.3.

VII. PROCEDURE IN JUVENILE COURT

The juvenile code of 1978 altered several important aspects of Indiana juvenile law procedure. The procedure sections of the new code are in sections 31-6-7-1 to -17[233] of the Indiana Code and contain provisions affecting a wide range of juvenile procedural rights. While there have been several articles dealing with the revisions in the juvenile code,[234] the focus of this section will be on several recent Indiana court cases interpreting the new code provisions.

In the area of procedure, two major concerns have emerged from recent court interpretations of the new code. There is first the standard of proof for juvenile acts. While the "beyond a reasonable doubt" standard has been maintained for proof "that a child committed a delinquent act, or that an adult committed a crime,"[235] all other offenses need only meet a "preponderance of the evidence" test.[236] This judicial construction concerning burden of proof has been questioned in light of *In re Winship*,[237] and *In re Gault*,[238] the two major United States Supreme Court decisions affecting juvenile rights.

The second major concern involving the procedure sections of the new code regards waiver of rights in a criminal setting. The code establishes a new, strict formula that must be met before admissions of a juvenile defendant may be used against him. The new code requires an intelligent waiver by the child's parent, guardian, or attorney.[239] The child also must knowingly and voluntarily waive his rights guaranteed by law.[240] Two major decisions have been handed down in this area interpreting the correct procedure for the state to obtain admissions of a juvenile defendant.[241]

A. Burden of Proof

The new Indiana Code section dealing with burdens of proof in juvenile matters states: "A finding by a juvenile court that a child committed a delinquent act, or that an adult committed a crime, must be based upon proof beyond a reasonable doubt. Any other

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[233]IND. CODE §§ 31-6-7-1 to -17 (Supp. 1981).

[234]*See* Kerr, *Foreword: Indiana's New Juvenile Code*, 12 IND. L. REV. 1 (1979); Kiefer, *This Code is Rated "R"—Second-Class Citizenship Under Indiana's New Juvenile Code*, 54 IND. L.J. 621 (1979).

[235]IND. CODE § 31-6-7-13(a) (Supp. 1981).

[236]*Id.*

[237]397 U.S. 358 (1970).

[238]387 U.S. 1 (1967).

[239]IND. CODE § 31-6-7-3 (Supp. 1981).

[240]*Id.*

[241]Deckard v. State, 425 N.E.2d 256 (Ind. Ct. App. 1981); Adams v. State, 411 N.E.2d 160 (Ind. Ct. App. 1980).

finding must be based upon a preponderance of the evidence."[242] This codification of the requisite burdens was seen as potentially conflicting with the standard mandated by the Indiana Supreme Court.[243] The court in *Warner v. State*[244] expressly stated that the "beyond a reasonable doubt" standard only applied in situations in which the act committed by the juvenile could be tried as a crime if the act was committed by an adult. The court reasoned that "[t]he application of this standard [reasonable doubt] in the determination of delinquency . . . is patently impractical, and we believe that it would seriously interfere with the juvenile court's effectiveness in carrying out its purposes."[245] Though the court's decision in *Warner* has been criticized as evading the real issue of legislative authority,[246] a recent Indiana Court of Appeals decision has confirmed the legislature's power in this area. In the case of *Puntney v. Puntney*,[247] the court held that the legislature has the ability to set out standards of proof as a procedural matter. It stated that because burdens of proof in civil matters are of common law origin, the legislature may vary the standard of proof necessary to carry the argument.[248]

> It is true that in some cases . . . the courts have developed a higher intermediate standard of proof. That rule does not appear to have a constitutional basis, but rather, seems to have been founded in the common law. Therefore, at the will of the legislature, it can be changed, as was done.[249]

Because the court failed to question the validity of the change in the standard of proof pursuant to the supreme court decision in *Warner*,[250] the legislative standard of proof will be used by the courts in future proceedings.

B. Waiver

The provision in the code that allows a juvenile to waive rights guaranteed by the United States Constitution, the Indiana Constitution, and all other applicable statutes has caused the greatest controversy in the procedural sections of the code. The waiver provision of the code states in part:

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[242]IND. CODE § 31-6-7-13(a) (Supp. 1981).
[243]*See* Kerr, *supra* note 49, at 26.
[244]254 Ind. 209, 258 N.E.2d 860 (1970).
[245]*Id.* at 214, 258 N.E.2d at 864-65.
[246]*See* Kerr, *supra* note 49, at 23.
[247]420 N.E.2d 1283 (Ind. Ct. App. 1981).
[248]*Id.* at 1286.
[249]*Id.*
[250]254 Ind. 209, 258 N.E.2d 860 (1970).

> (a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only:
> (1) by counsel retained or appointed to represent the child, if the child knowingly and voluntarily joins with the waiver; or
> (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
> (A) that person knowingly and voluntarily waives the right;
> (B) that person has no interest adverse to the child;
> (C) meaningful consultation has occurred between that person and the child; and
> (D) the child knowingly and voluntarily joins with the waiver.[251]

The waiver provision of the code arises out of the Indiana Supreme Court case of *Lewis v. State*.[252] In *Lewis*, the court noted the absence of a valid method for determining whether a juvenile had been adequately informed of his rights prior to a waiver.[253] The court set out a very specific test in order to assure that juveniles made a fair and knowing waiver of their rights:

> [A] juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore, the child must be given an opportunity to consult with his parents, guardian or an attorney representing the juvenile as to whether or not he wishes to waive those rights. After such consultation the child may waive his rights if he so chooses provided of course that there are no elements of coercion, force or inducement present.[254]

The juvenile code attempted to incorporate nearly all of the provisions in *Lewis* but added a section that has been the cause of two recent Indiana court cases. Specifically, the legislature, instead of putting the parents in a consulting role regarding the child's waiver, placed the emphasis of the waiver on the parents by allowing them an absolute veto to a voluntary waiver of the child's rights.

In *Deckard v. State*,[255] the Indiana Court of Appeals held that there must be strict compliance with the waiver provisions of the new code. The code provides that a juvenile's rights may be waived

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[251] IND. CODE § 31-6-7-3(a) (Supp. 1981).
[252] 259 Ind. 431, 288 N.E.2d 138 (1972).
[253] *Id.* at 436, 288 N.E.2d at 141.
[254] *Id.* at 439, 288 N.E.2d at 142.
[255] 425 N.E.2d 256 (Ind. Ct. App. 1981).

by a parent or guardian but does not authorize a minor to waive his own rights.[256] Although Deckard's mother was with him when he allegedly waived his fourth amendment rights, the subsequent search and seizure by police was held to be invalid because the mother had not signed any document purporting to have waived the child's rights. The court held that because the letter of the law was not met,[257] the incriminating evidence could not be admitted.[258] This decision appears to indicate the court's unwillingness to accept a waiver argument based solely on the fact that there was an opportunity for meaningful counsel.

In another recent case, the court of appeals dealt with a waiver by default when a minor, charged with a crime, requested counsel and was denied appointment of an attorney because of his parents' ability to pay. In *Adams v. State*,[259] the court ruled that the state's failure to provide an attorney in the matter constituted an illegal waiver of the child's right to counsel and the conviction was therefore reversed.[260] While the state in *Adams* contended that the juvenile had constructively waived his right to an attorney because the mother could afford counsel and therefore the state need not supply an attorney, the court found that the "waiver" was invalid under the statute and reversed the conviction. "If the juvenile court determines that the child is without an attorney and the child has not waived his right to counsel, the court must appoint counsel to represent the child."[261] The court in *Adams* again upheld the stringent waiver standards of the code and rejected the theory that a constructive waiver of rights may be made.

A review of the recent decisions in the area of juvenile procedure under the new code would suggest that Indiana courts are willing to follow the strict mandates set out by the Indiana legislature. Both *Deckard*[262] and *Adams*[263] show that the court of appeals will strictly construe the new waiver statute so as to provide an effective and meaningful limitation on juvenile waiver of rights. *Puntney*[264] clearly indicates that the court is willing to use the standards of proof set out in the code provisions. In the area of juvenile procedure, Indiana cases since the enactment of the code have upheld both the meaning and the spirit of the statute.

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[256] *Id.* at 257.
[257] *Id.*
[258] *Id.*
[259] 411 N.E.2d 160 (Ind. Ct. App. 1980).
[260] *Id.* at 163.
[261] *Id.* at 162.
[262] 425 N.E.2d at 256.
[263] 411 N.E.2d at 160.
[264] 420 N.E.2d at 1283.

VIII. CONCLUSION

Since its enactment in 1978, the juvenile code has undergone various revisions by the legislature and interpretation by the courts. Both branches of the state government, however, have adhered to the general purposes espoused by the 1978 code in ensuring that the "best interests" of the child are preserved. Major refinements include clarifying the definition of a child in need of services, establishing a standard for termination of the parent-child relationship, determining the type of evidence necessary to rebut the presumption of paternity, and defining the type of waiver acceptable for later court proceedings. Although further interpretations and refinements may be necessary to make the code a complete juvenile justice plan,[265] the clarifications made by the legislature and courts to date have upheld the meaning and spirit envisioned for the new juvenile code.

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[265]*See* Kerr, *supra* note 49, at 29.

Products Liability: Obviousness of Danger Revisited

JERRY J. PHILLIPS*

A. Eddies in the Law

Three decades ago it was not uncommon for courts to hold that plaintiffs were barred from recovery as a matter of law for injuries resulting from exposure to obvious dangers.[1] For example, in the 1950 decision of *Campo v. Scofield*,[2] the New York Court of Appeals held that the manufacturer only had a duty to avoid producing products with hidden defects or concealed dangers and was not obligated to produce accident-proof machines.

In recent years, however, the clear trend has been to abolish this rule and to hold, instead, that obviousness is only one factor to be considered by the trier of fact in determining whether a product or instrumentality is unreasonably dangerous.[3] In 1976, the prestigious New York Court of Appeals in *Micallef v. Miehle Co.*[4] overruled its 1950 decision in *Campo* and adopted the modern approach of not precluding liability solely because the danger was obvious. In *Auburn Machine Works Co. v. Jones*,[5] the Florida Supreme Court also rejected the patency rule in products liability, noting that:

> The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether plaintiff used that degree of reasonable care required by the circumstances.[6]

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[1]*See, e.g.*, Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950); *see also* Marschall, *An Obvious Wrong Does Not Make A Right: Manufacturers' Liability For Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065, 1081 (1973).

[2]301 N.Y. 468, 95 N.E.2d 802 (1950).

[3]*See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971) (applying Pennsylvania law); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Auburn Mach. Works v. Jones Co., 366 So. 2d 1167 (Fla. 1979). *See also* Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 422 (1979).

[4]39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[5]366 So. 2d 1167 (Fla. 1979).

[6]*Id.* at 1169. As the late Professor Dix Noel of the University of Tennessee College of Law suggested, "[u]nder the modern rule, even though the absence of a particular safety precaution is obvious, there ordinarily would be a question for the jury

This modern approach to obvious dangers in products liability is consistent with the approach taken in the field of land occupiers' liability. The Second Restatement of Torts provides that a possessor of land may be liable to his invitees for an activity or condition on the land where the danger is known or obvious and causes harm, if the "possessor should anticipate the harm despite such knowledge or obviousness."[7] The cases in this area recognize that, in spite of obviousness, the plaintiff's attention may be momentarily distracted, and the plaintiff thus inadvertently exposed to the danger.[8] Indeed, the plaintiff may be compelled by circumstances to confront a known danger, and may be injured while proceeding with all due caution.[9] The commentators in both the general area of tort law[10] and in the particular area of products liability[11] widely condemn the open and obvious rule as a conclusive bar to recovery.

Yet, in the face of these national trends and supporting commentaries, the Indiana Supreme Court held in 1981 in *Bemis Co. v. Rubush*[12] that obviousness of danger is a bar to recovery, as a matter of law, in products liability, both for alleged failure to warn and for defective design. In *Bemis*, the plaintiff, Gerald Rubush, was employed by Johns-Manville Corporation as a bagger on a fiberglass insulation batt packing machine designed and manufactured by Bemis Company. While working on the batt packer, Rubush sustained serious injuries to his skull and brain when he was struck by a visible moving part, called a shroud, on the batt packing machine. The plaintiff admitted that the shroud was an open and obvious danger which was well known to the operators of these machines and which would be obvious to anyone observing the machines in operation. The plaintiff contended, however, that the machine was unreasonably dangerous on the grounds that there was no safety device on the machine to prevent the shroud from descending on ob-

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as to whether or not a failure to install the device creates an unreasonable risk." Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 838 (1962).

[7]RESTATEMENT (SECOND) OF TORTS § 343A (1965).

[8]Yuma Furniture Co. v. Rehwinkle, 8 Ariz. App. 576, 448 P.2d 420 (1968); Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S.W.2d 625 (1941).

[9]This factual setting is often referred to as a "primary assumption of risk" wherein no duty is owed to the plaintiff. *See* Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971).

[10]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61, at 394-95 (4th ed. 1971).

[11]2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5, at 1543 (1956) (unreasonably dangerous condition should not be eliminated per se by making the danger obvious); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 422 (1979).

[12]427 N.E.2d 1058 (Ind. 1981).

jects which obstructed the pathway of the shroud. Bemis, on the other hand, contended that it could not be held liable in strict liability because any dangers created by the descending shroud were open and obvious. The Indiana Supreme Court, finding the danger obvious as a matter of law, upheld the obvious danger rule and remanded the case to the trial court with directions to enter judgment in favor of Bemis.[13]

In addition to the decision in the Indiana Supreme Court, it is significant that legislation is currently being considered in the United States Congress that would adopt the obvious danger rule as the national standard.[14] It is difficult to assess the likelihood of such a law being passed on the national level. It is clear, however, that powerful and well-organized lobbies are backing the passage of such legislation at both the federal and state levels.[15] Moreover, the mood of the country is decidedly conservative, and this conservatism has created significant eddies in the mainstream of products litigation.[16] It is appropriate, therefore, to reassess the efficacy of the obvious danger rule and to re-evaluate the reasons for its recent rejection in numerous jurisdictions.

B. The Obvious Danger Rule

1. What is an Obvious Danger?—One of the major difficulties in applying a rule which bars recovery as a matter of law for injuries from obvious dangers is the determination of when a danger is, in fact, obvious. In many cases, it is apparent that the courts are distorting the concept of obviousness in order to avoid application of the obvious danger rule because the rule is perceived as harsh and undesirable. For example, in *Bolm v. Triumph Corp.*,[17] the court, in

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[13]*Id.* at 1064.

[14]The Products Liability Act of 1982, H.R. 5214, 97th Cong., 2d Sess., has been referred to the House Subcommittee on Commerce, Transportation and Tourism but has not been scheduled for consideration. Hon. Henry Waxman is chairman of the House subcommittee. The Consumer Subcommittee of the Senate Commerce Committee is currently considering a working staff draft on products liability, and Senator Robert W. Kasten, Jr., the chairman of the the subcommittee, intends to introduce a bill on products liability by the end of June, 1982.

[15]One of the primary lobby groups, representing a very wide spectrum of manufacturing and insurance industries, is the National Center For The Public Interest, 1101 17th St., N.W., Suite 810, Washington, D.C. 20036. Also, in discussing the proposed federal legislation, the editor of BUSINESS WEEK notes the existence of a "lobbying group, the Product Liability Alliance, recently formed to back federalization [of products liability law]. Among its 180 members are some of the largest U.S. companies and trade associations." *A Liability Patchwork Congress May Replace*, BUSINESS WEEK, May 31, 1982, at 34.

[16]Recently enacted restrictive state statutes are collected in [1981] PROD. LIAB. REP. (CCH) ¶¶ 90,112-95,265.

[17]33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973).

applying the *Campo* open and obvious rule, held that the obviousness of the danger created by a metal luggage rack, or "parcel grid," fixed to the top of the plaintiff's motorcycle gas tank about three inches above and three inches in front of the rider's seat presented a question for the jury.[18] In *Lamon v. McDonnell Douglas Corp.*,[19] the court held that a jury question was presented regarding the unreasonable danger of an open emergency hatch in an airplane.[20] The court in *Brown v. North American Manufacturing Co.*[21] held that a jury question was presented as to the unreasonable danger of an unguarded grain auger.[22] In *Coger v. Mackinaw Products Co.*,[23] an inadequately designed mechanical log splitter with a dangerously exposed wedge-shaped blade was not found to present an obvious danger. The court, relying upon the difference between products, distinguished its holding from an earlier case[24] which found obviousness of danger barred recovery. In the earlier case, the product, a milk bottle wire carrier, was a "simple tool whose character was uncomplicated and obvious;" whereas, the product involved in the present case was a "complicated mechanical contrivance."[25]

The technique of distorting the concept of obviousness, exemplified in the cases above, is frequently used by courts to avoid the absolute bar of recovery as a matter of law.[26] It is not, however, a desirable approach because it is uncertain in application and involves an element of subterfuge. If the obvious danger rule is not a good rule, it should be rejected outright. Moreover, the adoption of the open and obvious rule in Indiana presents the added possibility that the Indiana state courts will apply the obvious danger rule with Draconian efficiency, while Indiana federal courts, sitting in diversity, will adopt a policy of leniency.[27] Such a development will create the unfortunate result of the plaintiff's rights turning on the fortui-

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[18]*Id.* at 159-60, 305 N.E.2d at 774, 350 N.Y.S.2d at 651. The court distinguished obviousness of *condition* from obviousness of *danger* and stated that the obviousness of danger "turn[ed] upon the perception of the reasonable user of the motorcycle as to the dangers which inhere in the placement of the parcel grid." *Id.* at 160, 305 N.E.2d at 774, 350 N.Y.S.2d at 651.

[19]19 Wash. App. 515, 576 P.2d 426 (1978), *aff'd*, 588 P.2d 1346 (Wash. 1979).

[20]*Id.* at 515, 576 P.2d at 429-31.

[21]576 P.2d 711 (Mont. 1978).

[22]*Id.* at 717-18.

[23]48 Mich. App. 113, 210 N.W.2d 124 (1973).

[24]Fisher v. Johnson Milk Co., 383 Mich. 158, 174 N.W.2d 752 (1970).

[25]48 Mich. App. at 121, 210 N.W.2d at 128 (1973).

[26]*See, e.g.*, Ford Motor Co. v. Rodgers, 337 So. 2d 736, 740 (Ala. 1976).

[27]*Compare* Lantis v. Astec Indus., Inc., 648 F.2d 1118 (7th Cir. 1981) (applying Indiana law) *with* Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981).

ty of whether he or she happens to be of diverse citizenship from the defendant.[28]

2. Exceptions to the Rule.—There are a number of possible exceptions to the open and obvious rule which obviate the harsh and many times undesirable result of the rule. The complicated-machinery exception of the *Coger* case is one example.[29] It appears unlikely that Indiana will adopt this exception because the batt packing machine in the *Bemis* case was clearly a complicated piece of machinery.

Some cases create an exception for the bystander. As the court explained in *Pike v. Frank G. Hough Co.*,[30] the "danger to bystanders is not diminished" because the purchaser is aware of the danger.[31] In *Bemis*, Rubush was a user and not a bystander; therefore, this exception could not be applied in *Bemis*.

Other cases accord special treatment to the minor plaintiff.[32] The minor, like the bystander, is presumed to be unaware of the danger and therefore cannot protect himself. To treat the minor, or the bystander, differently from a user of the product, in determining the obviousness of the danger, directs consideration away from an objective standard of the obviousness of the danger and toward a subjective one—that of assumption of the risk.

Many cases recognize that the plaintiff who suffers a workplace injury should not be denied recovery where the unreasonable danger to which he is exposed is obvious, because his exposure is not voluntary.[33] The focus here on voluntariness once again, as with

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[28]Although the federal courts would be bound to follow the substantive law of Indiana under the doctrine stated in Erie Ry. v. Tompkins, 304 U.S. 64 (1938), federal courts could utilize the techniques described in this Article to reduce the harshness of the open and obvious danger rule.

[29]*See* notes 23-25 *supra* and accompanying text.

[30]2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (bystander was injured by a backward-moving earthmover which lacked mirrors).

[31]*Id.* at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634. Although Indiana has not carved out a rigid exception to the rule for bystanders, the Indiana Court of Appeals, in a case factually similar to *Pike*, asserted that it is for the jury to determine whether a reasonable bystander would have had sufficient awareness of the defect to have incurred the risk. Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 430, 357 N.E.2d 738, 746 (1976). The language of this decision could reasonably be construed as going to the question of patent-latent distinctions.

[32]*See* DeSantis v. Parker Feeders, Inc., 547 F.2d 357, 364 (7th Cir. 1976); *see also* Phillips, *Products Liability For Personal Injury To Minors*, 56 VA. L. REV. 1223, 1228 (1970).

[33]*See, e.g.*, Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971). Other courts have said there is no assumption of risk with regard to the very danger the defendant is required to guard against. Coty v. United States Slicing Mach. Co., 58 Ill. App. 3d 237, 373 N.E.2d 1371 (1978); Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972).

the minor and the bystander, points the issue where it belongs; that is, the issue becomes assumption of risk and not merely consideration of the obviousness of the danger.

The adoption of the obvious danger rule in the area of products liability may have a significant impact on other related fields of law. A number of cases, and the Second Restatement of Torts, allow recovery against a land occupier for injuries resulting from obvious dangers when it is foreseeable that injury will result despite the obviousness of the danger.[34] Indiana must now choose whether to follow the Restatement rule, or to treat a land occupier like a product seller. There is no good reason for treating the two differently. Nor is there an adequate justification for distinguishing the result in cases of a builder-vendor who sells premises in an obviously defective condition from the result in products liability cases where the danger is obvious.[35]

A unique problem arises in determining the recovery allowed a rescuer. The law generally extends favorable treatment to the rescuer.[36] A rescuer rushes, in the face of an obvious danger, to save a helpless victim; however, the rescuer may be denied recovery if the cause of the peril is a product, instead of a person.[37] If the person rescuing a victim endangered by a product would be denied recovery, but the rescuer of a person from danger created by another is allowed to recover, does the different treatment violate constitutional principles of equal protection?[38]

Finally, a number of cases recognize an exception to the bar of the obviousness rule where the defendant has made a misrepresentation, by advertisement or otherwise, that lulls the plaintiff into a false sense of security.[39] The rationale for this exception has a great deal of appeal. If the defendant misleads the plaintiff and causes injury thereby, it is only just that he should pay for the injury. But

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[34]*See* notes 7-8 *supra* and accompanying text.

[35]*Cf.* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (a builder-vendor could be strictly liable for injuries caused by a bathroom faucet if the design were unreasonably dangerous and caused the injury).

[36]Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437 (1921) ("Danger invites rescue. The cry of distress is the summons to relief.").

[37]*See* Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 466, 255 N.E.2d 173, 176, 306 N.Y.S.2d 942, 946 (1969) (Scileppi, J., concurring) (objecting to the extension of the rescue doctrine to products liability cases).

[38]*Cf.* Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980) (product liability statute of repose creates an unconstitutional classification); Bolick v. American Barmag Corp., 284 S.E.2d 188 (N.C. Ct. App. 1981) (following *Battilla*); *accord*, Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) (architects' and builders' statute of repose creates an unconstitutional classification).

[39]*See* Jonescue v. Jewel Home Shopping Serv., 16 Ill. App. 3d 339, 306 N.W.2d 312 (1973); McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967).

the misrepresentation cases are not clearly and easily identifiable as such. As Justice Traynor pointed out in the landmark case of *Greenman v. Yuba Power Products, Inc.*,[40] implicit in a product's presence on the market is an implied representation that it will "safely do the jobs for which it was built."[41]

Each of these exceptions to the obvious danger rule and the different treatment in non-products cases has considerable appeal. Yet, it is difficult to justify these exceptions in lieu of abolishing the rule itself, just as it is often hard to distinguish the obvious from the latent defect. As the courts have so often said in extending the doctrine of products liability, no rational line can be drawn to avoid the extension.[42] The exceptions tend to swallow the rule.

C. Policy Considerations Applicable to Obvious Dangers

In some cases, the courts talk in terms of obviousness of danger when they really mean that the product is not defective because the product cannot be made safer without destroying its utility.[43] Thus, an axe, although obviously sharp, is not unreasonably dangerous because it is a useful implement and the usefulness depends upon its sharpness. This analysis also explains the cases where the court denies recovery based on presumed common knowledge of the danger, even when it is apparent that the plaintiff lacked actual knowledge. It is assumed, for instance, that the plaintiff knows that fish chowder contains bones,[44] or that raw pork may contain trichinae,[45] because bones and trichinae cannot be removed from these products without destroying their desired quality. Such cases should not be confused with those where the danger is obvious but serves no useful purpose, that is, where the danger can be economically eliminated without destroying the product's utility and purpose.

Obvious dangers created by defective production or design should be distinguished from those arising from failure to warn. It makes sense, as many cases have held,[46] that there is no duty to warn of an obvious danger where the plaintiff is fully aware of that danger, because a warning would not add to the knowledge the

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[40]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[41]*Id.* at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[42]*See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 383, 161 A.2d 69, 83 (1960) ("We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile.")

[43]*See, e.g.*, Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957) (exerciser rope).

[44]*See* Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309 (1964).

[45]*See* Kobeckis v. Budzko, 225 A.2d 418 (Me. 1967).

[46]*See* notes 43-45 *supra* and accompanying text.

plaintiff already has.[47] It is a different matter, however, to conclude that there is no duty to redesign where the danger is unreasonable but obvious.[48] The inadvertent victim will be protected if the danger is eliminated, but he will not be so protected if he is simply unaware of a warning or of an obvious danger.

The rationale supporting the open and obvious danger rule is that the plaintiff should be barred from recovery because of his culpable failure to avoid an apparent danger. This rationale is identical to that underlying the defenses of contributory negligence and assumption of the risk. There are, however, important procedural distinctions between obviousness, on the one hand, and contributory negligence or assumption of the risk, on the other. The latter are defenses, with the burden of proof on the defendant;[49] whereas negation of obviousness is part of the plaintiff's burden of proof.[50] With the burden on the defendant rather than the plaintiff, a jury question rather than one of law is usually presented, as it should be in such a fact-sensitive context. In the majority of jurisdictions that apply comparative fault, these defenses may serve only to reduce recovery.[51] The obviousness doctrine, on the other hand, has the harsh and excessive effect of barring recovery entirely.[52]

Moreover, the potential for culpability on the part of the manufacturer of an obviously dangerous product, on balance, far outweighs that of the culpable plaintiff who exposes himself to that danger. The plaintiff may be injured through inadvertence, distractions, work pressures, and the like. It is hardly likely that Rubush, the injured party in *Bemis*, intentionally subjected himself to the crippling and devastating injury he suffered from defendant's batt

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[47]It should be noted, however, that obviousness of danger does not limit the manufacturer's duty to warn. As one commentator suggests, "obviousness does not *limit* the manufacturer's duty to warn—rather it *discharges* that duty." Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 400 (1979).

[48]As Professor Wade illustrates:

> it is not necessarily sufficient to render a product duly safe . . . [because] its dangers are obvious, especially if the dangerous condition could have been eliminated. A rotary lawn mower, for example, which had no housing to protect a user from the whirling blade would not be treated as duly safe despite the obvious character of the danger.

Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 842-43 (1973) (footnotes omitted).

[49]*See* Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965) (contributory negligence); Luque v. McLean, 8 Cal. 3d 136, 104 Cal. Rptr. 443, 501 P.2d 1163 (1972) (assumption of risk).

[50]*See* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

[51]*See* Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C.L. REV. 295, 299 (1980).

[52]*See, e.g.*, Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981); Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

packing machine. The defendant's decision to market an obvious and unreasonably dangerous product, however, is intentional and calculated, or as one court has described it, "calloused."[53] The defendant's action evidences the kind of conduct for which punitive damages have traditionally been awarded. As the court said in *Auburn Machine Works Co. v. Jones*:[54]

> The patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious. For example, if the cage which is placed on an electric fan as a safety device were left off and someone put his hand in the fan, under this doctrine there would be no duty on the manufacturer as a matter of law. So long as the hazards are obvious, a product could be manufactured without any consideration of safeguards.[55]

D. Resolving the Impasse

One solution to the problems created by *Bemis* is for the Indiana Legislature to pass a statute providing that obviousness is not a bar as a matter of law in products cases involving defective design, production, or misrepresentation.[56] Thus, a court, otherwise inclined to adopt a rule of obviousness as a bar, would be required to defer to a legislative determination of the matter.[57]

Regardless of whether a legislative resolution is politically feasible, the Indiana Supreme Court should not abdicate its role in regard to the obvious danger rule. Having made the decision, which is a bad one, it should dispose of the decision either by limiting the holding to its facts,[58] or by overruling it outright. The Indiana Supreme Court has overruled bad precedent in the past,[59] and it should do so in this instance as well.

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[53]Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972).

[54]366 So. 2d 1167 (Fla. 1979).

[55]*Id.* at 1170-71.

[56]In his dissenting opinion in *Bemis*, Justice Hunter suggests that Indiana's Products Liability Act, which became effective after the *Bemis* action arose, impliedly rejects the open and obvious rule. The statute sets out a defense which allows a defendant to present a question of fact on whether it was reasonable for the party to proceed in the face of an open and obvious danger. According to Justice Hunter, this question generally will be resolved by a jury. Bemis Co. v. Rubush, 427 N.E.2d 1058, 1071 (Ind. 1981) (Hunter, J., dissenting) (citing IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1981)).

[57]*See* Campo v. Scofield, 301 N.Y. 468, 475, 95 N.E.2d 802, 805 (1950).

[58]The court suggests, without so holding, that the batt packing machine was not defective because a safer design was not feasible. Bemis Co. v. Rubush, 427 N.E.2d 1058, 1061 (Ind. 1981).

[59]*See, e.g.*, Theis v. Heuer, 264 Ind. 1, 280 N.E.2d 300 (expressly overruling prior precedent and recognizing an implied warranty of habitability from the builder-vendor of a new house).

Notes

The Surrogate Mother Contract in Indiana

I. INTRODUCTION

The "traditional" family invokes an image of father, mother, and child. However, many couples today have difficulty turning this image into a reality.[1] Consequently, some couples faced with a three to seven year wait for an adoptable infant[2] are turning to nontraditional methods for having a child. Many couples are choosing to hire a surrogate mother,[3] an arrangement in which the couple hires a woman to conceive and carry the child for them.

The typical surrogate mother arrangement is based on a contract. Generally in return for an established fee,[4] a woman agrees to be artificially inseminated with the semen of the husband, to carry the child to full term and then to relinquish all parental rights.[5] Then the biological father normally establishes paternity, and the couple adopts the child.[6] Although artificial insemination itself is not

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[1]Handel & Sherwyn, *Surrogate Parenting*, TRIAL, Apr. 1982, at 57-58 [hereinafter cited as *Surrogate Parenting*].

[2]*Adoption and Foster Care, 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 1, 6 (1975) (statement of Joseph H. Reid, Executive Director, Child Welfare League of America, Inc.) [hereinafter cited as *Adoption and Foster Care, 1975*].

[3]A Michigan attorney, Noel Keane, has handled several surrogate mother contracts and has had requests from clients as distant as Ireland and Saudi Arabia. Christopher, *A Judgment for Solomon*, MACLEANS, Apr. 6, 1981, at 33. At least two clinics, Surrogate Parents' Foundation, Inc. in California, and The Surrogate Parenting Association in Louisville, Kentucky, perform screening services to match surrogates with childless couples. Markoutsas, *Women Who Have Babies for Other Women*, GOOD HOUSEKEEPING, Apr. 1981, at 96, 102, 104; Beck, *To My Sister With Love*, MCCALLS, Sept. 1981, at 83, 135.

[4]Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147, 147.

[5]Comment, *Contracts to Bear a Child*, 66 CAL. L. REV. 611, 611 (1978). Another form of surrogate motherhood is fertilizing the wife's egg with the husband's semen and then transplanting it into the surrogate. This procedure might be used if the wife's reproductive faculties are only partially impaired to the extent that she is fertile, but could not carry the pregnancy to term. *See* Vieth, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. OF LEGIS. 140, 142 n.15 (1981). This Note will deal only with the first type of surrogate mother, although the same policy arguments generally apply to this second type as well.

[6]Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147, 147. If the husband has established his paternity, he would not have to adopt the child. His wife would need to adopt in order to be the child's legal mother.

new, its customary use has been to help a wife conceive when the husband is sterile.[7] The surrogate arrangement also uses artificial insemination, but because the wife is unable to conceive or carry a child.

Although state legislatures and the courts have begun to recognize and to protect parties involved in the artificial insemination donor (AID) procedure,[8] the surrogate mother has yet to receive the same protection. Surrogate mother contracts are known to exist in only a few states,[9] but in the two states which have addressed the legality of surrogate mother contracts, Kentucky and Michigan, the contracts have been found violative of existing state statutes and public policy.[10] In addition to these conflicts, several other legal obstacles are inherent in such a contract under existing statutes and case law: illegitimacy and paternity, custody and adoption, and the rights of the parties in case of a breach of the contract.[11]

This Note explores these problems and presents an argument for finding the contract valid in Indiana. The Note examines the purpose of the surrogate mother contract as well as its terms, and applies Indiana's statutes and public policy to the contract to determine whether the contract would be valid in this state. An examination of the parties' rights and remedies under Indiana's family laws encompasses both contractual and noncontractual remedies, in the event such a contract is invalid in Indiana. The Note also recommends standard provisions for a surrogate contract that would protect all parties involved and examines the need for new legislation addressing the surrogate mother situation.

II. LEGAL OBSTACLES TO THE CONTRACT

The two primary legal obstacles to a surrogate mother contract

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[7]Current estimates show that between 6,000 and 10,000 children are born annually in the United States as a result of artificial insemination. *Id.* at 148 (citing Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979)).

[8]Approximately one-third of the states have addressed the artificial insemination donor (AID) either legislatively or judicially. [1979-1981] REP. ON HUMAN REPRODUCTION AND THE LAW (Legal-Med. Studies) at II A9, II B2 [hereinafter cited as REP. H.R.L.]; *see* Keane, *supra* note 4, at 153.

[9]Surrogate mother contracts have been reported in Texas, Michigan, California and Kentucky. REP. H.R.L., *supra* note 8, at II A9. Only Kentucky and Michigan have ruled on the contract's validity. *See* notes 10 & 17 *infra* and accompanying text. California authorities are ignoring the surrogate contracts even though the contract may violate several state statutes. *Surrogate Parenting*, *supra* note 1, at 58.

[10]*Kentucky Attorney General Issues Advisory Opinion on Surrogate Motherhood*, REP. H.R.L., *supra* note 8, at II A9; Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) 3011, *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

[11]*See* notes 110-67 *infra* and accompanying text.

in many states are that the contract violates a statute and that it is contrary to public policy.[12] In a few states, artificial insemination is considered adultery and constitutes a crime.[13] In all fifty states, it is a crime to profit from adoption, or to "sell children."[14] Thus, in states proscribing adultery and child selling as criminal offenses, the surrogate mother contract could violate statutory law, as well as the public policy on which these statutes are based.[15] Therefore, if surrogate mothering is viewed as either child selling or adultery, the result is an illegal contract.[16] In Kentucky and Michigan, the two states that have ruled on surrogate mother contracts, the courts construed the contracts as child selling. In holding that the contracts were illegal, the courts relied on the existing state statutes prohibiting profit from adoption and the underlying public policy.[17] In comparison, Indiana law does not present as great an obstacle to the legality of a surrogate mother contract.

A. Indiana Law

Even if an Indiana court were to define artificial insemination as adultery,[18] Indiana repealed its adultery statute in 1977.[19] Because adultery is not a ground for divorce in Indiana,[20] the contract could not be found to promote divorce. Thus, a surrogate mother contract would neither violate an adultery statute nor public policy proscribing adultery.

Profiting from adoption is a crime in Indiana, although excep-

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[12]Keane, *supra* note 4, at 148; Vieth, *supra* note 5, at 144; Comment, *supra* note 5, at 612-13.

[13]*See* Keane, *supra* note 4, at 149.

[14]*See* Vieth, *supra* note 5, at 145.

[15]*See* Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) at 3013. A modern court probably would not view artificial insemination as adultery because it does not involve sexual intercourse. *See* Keane, *supra* note 4, at 150-51.

[16]6A A. CORBIN, CORBIN ON CONTRACTS §§ 1373, 1375 (1962).

[17]*See* REP. H.R.L., *supra* note 8, at II A9; Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) 3011. The Kentucky Attorney General concluded that a surrogate contract would violate KY. REV. STAT. §§ 199.500(5) and 199.601 (Supp. 1980). Both prohibit consent to adoption until five days after the birth of a child. He also concluded that the contract would violate KY. REV. STAT. § 199.590(2) (1972), which prohibits unlicensed persons from receiving money for procurement of a child for adoption. REP. H.R.L., *supra* note 8, at II A9. A Michigan court held that the contract violated a Michigan statute, MICH. COMP. LAWS § 710.54 (1981), which prohibits offering, giving or receiving money or other consideration for placing a child for adoption, and for locating a child for adoption. The statute also prohibits the receipt of compensation for a release, consent, or petition for adoption unless approved by the court. Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) 3011.

[18]*See* Keane, *supra* note 4, at 149-51.

[19]IND. CODE § 35-1-82-2 (Supp. 1981) (repealed 1977).

[20]*Id.* § 31-1-11.5-3.

tions allow some payment to the natural mother.[21] It is a class D felony in Indiana to receive any property in exchange for the "termination of the care, custody, or control of a person's dependent child."[22] However, the law makes an exception for property transferred under Indiana Code section 35-46-1-9(b) pursuant to a supervised adoption.[23] This statute allows payment of reasonable attorney's fees, the mother's hospital and medical expenses for the pregnancy and childbirth, and other fees approved by the court supervising the adoption.[24] Two other statutes under Indiana's paternity laws provide for payment to the natural mother; thus, a woman may recover reasonable attorney's fees[25] as well as medical and hospital expenses,[26] which can include the cost of pregnancy, childbirth, and prenatal and postnatal care.[27]

Neither the Kentucky nor the Michigan adoption statute is this liberal. The Kentucky statute prohibits any unlicensed person from receiving compensation for procurement of a child for adoption.[28] Michigan prohibits offering, giving, or receiving money or other compensation for placing or locating a child for adoption.[29] Michigan also prohibits compensation for the release, consent, or petition for an adoption unless approved by the court.[30] Thus, the Indiana law differs from both the Michigan and Kentucky statutes by allowing the natural mother to recover, without court approval, her costs incurred for the pregnancy and adoption of the child. Consequently, under existing Indiana statutes the contract would not be a crime if the surrogate's fees were limited to actual medical and legal expenses. A fee subject to these limitations, however, would probably be insufficient consideration for the surrogate's services.

Unless the surrogate is motivated by purely altruistic reasons, [31]

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[21]*Id.* §§ 35-46-1-4(b)(2), -9(b).

[22]*Id.* § 35-46-1-4(b). A person convicted of a class D felony shall be imprisoned for a fixed term of two years and may be fined up to $10,000. The court, at its discretion, may enter judgment of a Class A misdemeanor. *Id.* § 35-50-2-7. For a Class A misdemeanor a person shall be imprisoned for not more than one year and may be fined up to $5,000. *Id.* § 35-50-3-2.

[23]*Id.* § 35-46-1-9(b).

[24]*Id.*

[25]*Id.* § 31-6-6.1-18.

[26]*Id.* § 31-6-6.1-17.

[27]*Id.*

[28]KY. REV. STAT. § 199.590(2) (1972).

[29]MICH. COMP. LAWS § 710.54 (1981).

[30]*Id.*

[31]Women generally say they became surrogates to help a childless couple. However, many also receive a fee. The exceptions include the woman who had a child for her sister, Beck, *supra* note 3, at 134, and another woman who did so out of friendship. Markoutsas, *supra* note 3, at 98. "I wanted to give her a gift, something she could not have." *Id.*

she wants additional compensation for her nine months of service. Although a working surrogate might receive disability benefits during part of the pregnancy,[32] the benefits would still be inadequate consideration for the risk and inconvenience of pregnancy and childbirth.[33] In Indiana, the court supervising the adoption would have to approve any supplemental fee paid to the surrogate due to the preclusive nature of the relevant statutes,[34] which limit compensation to medical and legal expenses absent court approval.

Because the adoption cannot be effectuated until after the baby is born, the contract is executory and its validity can not be tested until the time of adoption. Therefore, the contract's legality would be uncertain during the entire pregnancy. At the time of adoption the court could uphold the contract on the basis of pure contract law.[35] If the court views the contract as allowing the surrogate to profit from the adoption, however, the contract would violate the Indiana statute[36] proscribing such activity and, as a result, be void.[37] Therefore, whether a surrogate can receive fees other than medical and legal expenses will depend on whether Indiana courts will construe such a contract as "child selling" in violation of both statutory law and public policy.

B. Public Policy Considerations

Several authorities have expressed the view that at least some surrogate mother contracts are against public policy.[38] The public policy considerations have centered around baby selling, the exploitation of needy women, the disruption of the natural tie between the surrogate and the child, and the effect surrogate motherhood may have on the traditional family.[39]

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[32]42 U.S.C. § 2000(e) (Supp. III 1979) allows disability benefits based on pregnancy. Equal Employment Opportunity Commission regulations provide that a woman does not have to be married in order to qualify for the benefits. 29 C.F.R. § 1604.10(b) (1981) (appendix at 133). The law only applies to those employers that have disability benefit plans. Id. § 1604.10(b).

[33]Fees range from $1,000 on up, but the average seems to be between $10,000 and $15,000. Markoutsas, *supra* note 3, at 99, 104.

[34]*See* IND. CODE § 35-46-1-9(b)(4) (Supp. 1981).

[35]The court might uphold the contract based on reliance by any of the parties or on estoppel. *See generally* 1 A. CORBIN, CORBIN ON CONTRACTS §§ 193-208 (1962).

[36]*See* IND. CODE § 35-46-1-4(b) (Supp. 1981).

[37]*See* Brokaw v. Brokaw, 398 N.E.2d 1385 (Ind. Ct. App. 1980).

[38]*See* Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) 3011. *See generally Protection of Human Subjects; HEW Support of Human In Vitro Fertilization and Embryo Transfer: Report of the Ethics Advisory Board*, REP. H.R.L., *supra* note 8, at II B2; Veith, *supra* note 5, at 144-47.

[39]*See* Vieth, *supra* note 5, at 146.

In *Doe v. Kelley*,[40] the plaintiffs, a childless couple and a potential surrogate who was to receive $5,000 plus medical expenses for her services, filed for a declaratory judgment to have Michigan's child selling law[41] declared unconstitutional and to prevent their prosecution under the statute. The plaintiffs attacked the Michigan statute as void for vagueness and also alleged that the surrogate contract was within their constitutional "right of privacy."[42] The court rejected both constitutional claims, holding that the Michigan statute was not void for vagueness[43] and that the right to adopt a child for a fee was not a fundamental right.[44] The trial court viewed the surrogate mother contract as "baby bartering," an activity which the state had a compelling interest in preventing.[45] The court then discussed this compelling state interest in regulating adoptions for profit based on public policy grounds.

Citing the Michigan statute that parents cannot barter or sell their children, or profit from consent to adoption, the *Kelley* court stated that the purpose of the statute was to prevent "commercialism from affecting a mother's decision to execute a consent to the adoption of her child."[46] Although the court acknowledged the plaintiffs' argument that they were acting in good faith and with the best intentions, it replied that public policy against child selling applied to all Michigan citizens regardless of intent.[47] The court concluded that although the surrogate mother arrangement was, in some respects, not the type of action the Michigan legislature contemplated or attempted to proscribe when it enacted the challenged statute, the statute still applied to the plaintiffs.[48]

In concluding that surrogate mothering violated public policy, the court accepted the Michigan Attorney General's argument that the effect of the surrogate agreement is to encourage women to have babies they do not want. According to the attorney general, such an arrangement is "child selling."[49] The court was not presented with the alternative and completely plausible interpreta-

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[40][1980] 6 FAM. L. REP. (BNA) 3011, *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

[41]*See* note 17 *supra*.

[42]Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) at 3012. In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court held that the right of privacy included a woman's decision to have a child. *Id.* at 152-54.

[43][1980] 6 FAM. L. REP. (BNA) at 3012.

[44]*Id.* at 3013.

[45]*Id.*

[46]*Id.*

[47]*Id.* at 3014.

[48]*Id.*

[49]*Id.* at 3013.

tion that a woman is selling her childbearing capability only as a service to a couple who desires to have a child.[50] This view of the surrogate mother is comparable to the artificial insemination donor who sells his biological services so infertile couples might have children.[51]

Many courts and legislatures no longer view the fathering of children for married couples by anonymous male donors as being against public policy.[52] Yet the same forums may find it against public policy to compensate a woman who goes through "the inconvenience, discomfort, and dangers of pregnancy and childbirth."[53] The Michigan court's reasoning seems to be that, but for the surrogate agreement, the child would not be born and that it is money which induces the surrogate to carry the child. Ironically, however, the same rationale applies to artificial insemination donors. But for the donor's sperm, there would be no child, and it is money that induces the donor to become involved. Although not articulated in the trial court opinion, the difference between the two is that the surrogate actually produces a child which is then given up for adoption. It is the adoption rather than the services that triggers the child selling statutes. Technically, it is consenting to the adoption for money which is illegal, not bearing the child.

The Michigan Court of Appeals did make this distinction between the surrogate's childbearing services and her consent to adoption. The appellate court held that the use of a surrogate mother was within the plaintiffs' constitutional right of privacy, but that compensation paid in connection with Michigan's adoption statutes was not constitutionally protected.[54] Because the statute did not *directly* prohibit the plaintiffs from having the child as planned, the court upheld the statute.[55] The appellate court refused to apply the compelling state interest standard to determine whether the burden the statute imposed on the plaintiffs' rights was justified.[56] Rather,

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[50]William Handel, a California attorney and a member of Surrogate Parents' Foundation, Inc. says, "We are negotiating payment for a woman's service." Beck, *supra* note 3, at 135. This is also the way women who have served as surrogates feel. *See* Markoutsas, *supra* note 3, at 98-99.

[51]*See* Keane, *supra* note 4, at 153 n.54. A recent survey showed that donors are paid between $20 and $35 per ejaculation. *Id.*

[52]*See* notes 7 & 8 *supra.*

[53]Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) at 3013-14 (citing the Executive Director for the Program in Law, Science and Medicine at Yale Law School in A. HOLDER, LEGAL ISSUES AND PEDIATRICS AND ADOLESCENT MEDICINE 7-8 (1977)). The constitutionality of this unequal treatment of AID and surrogate mothers has been questioned, but is beyond the scope of this Note. *See* Keane, *supra* note 4, at 166.

[54]Doe v. Kelley, 106 Mich. App. at 173, 307 N.W.2d at 441.

[55]*Id.*

[56]*Id.* For a discussion on the constitutional aspects of *Kelley* see Note, *Surrogate*

the court found that the statute was a reasonable regulation without even exploring whether it was rationally related to the surrogate arrangement.[57]

The rationale behind laws forbidding compensation to a natural mother is to prevent the sale of children through black market adoptions, where the potential for harm to the child, mother, and couple is great.[58] In such transactions, the profit motive of the middleman often will prevail over the best interests of any of the parties. By circumventing the state adoption regulations, the black market adoption has none of the safeguards of the regular adoption procedure.[59] The child is not protected from being placed in an unsuitable home,[60] nor is the couple protected from unscrupulous "salespersons." Further, the natural mother, who is probably young, unmarried, and unaware of her legal rights, may be subject to exploitation because she is in a position which she neither bargained for nor contemplated.[61]

This rationale does not apply to the surrogate mother arrangement. First, the adoption is not taking place between strangers, because the biological father is retaining custody of his natural child. Consequently, the best interests of the child will be of paramount concern to the adopting couple, and the adoption is more likely to be successful. Second, the biological mother has planned the pregnancy so she should be emotionally and physically fit to carry the child. Because she has entered the contract prior to the pregnancy she is more likely to be in an equal bargaining position with the couple than a woman carrying an unplanned or unwanted child. Finally, the surrogate mother arrangement is conducive to state regulation just as is any adoption, child custody case, or paternity action. Such regulation would protect the interests of all the parties.

Because the rationale for the child selling laws does not apply to the surrogate mother contract, the public policy for *allowing* such contracts must be explored. Some critics have been concerned with the break in the natural bond between a mother and child in the surrogate arrangement.[62] Although this may be a legitimate concern,

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Motherhood: The Outer Limits of Protected Conduct, 1981 DET. C.L. REV. 1131, 1139-41.

[57]Doe v. Kelley, 106 Mich. App. at 173, 307 N.W.2d at 441.

[58]*See* Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) at 3014. In the normal "child selling" arrangement a middleman arranges for the adoption between the natural mother, usually unwed, and the adopting couple. The middleman receives a fee. *Adoption and Foster Care, 1975, supra* note 2, at 4.

[59]*See generally Adoption and Foster Care, 1975, supra* note 2.

[60]*See id.*; IND. CODE § 31-3-1-3 (1976).

[61]*See Adoption and Foster Care, 1975, supra* note 2, at 5-7.

[62]Vieth, *supra* note 5, at 146.

the trauma is no greater for the surrogate mother than for a mother who is forced to give up a child for adoption or who loses custody of her child in a divorce action. In fact, the trauma of breaking the bond should be less because the surrogate mother enters the pregnancy knowingly, with the intent of relinquishing all parental rights.[63] Additionally, although the bonding between the surrogate mother and child is broken, the bonding between the child and its natural father is fostered.

Another strong policy consideration is the effect the surrogate arrangement may have on the traditional family. The *Kelley* court said "[m]ercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community."[64] As has already been noted, the AID procedure also creates a parent-child relationship based on monetary consideration, but this procedure has not destroyed the family or the community. To the contrary, these unconventional methods of reproduction may help strengthen the family and community by allowing more couples to have children and, in addition, by having the children be biologically related to one of the parents. The surrogate mother option is especially relevant to many childless couples because adoption has become so difficult.[65]

Society is interested in furthering strong family units. The surrogate mother contract serves this goal. Persons who are willing to take this unconventional route, with all of its inherent problems,[66] to "create" a family should be capable of building as strong a family unit as those persons conceiving a child in the conventional way. The surrogate mother contract is not something one should enter into lightly, without any thought or consideration for the results of the contract.[67] Because the surrogate arrangement can create and enhance a family unit, it is entitled to the same legal deference that other family arrangements are given.

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[63]Interviews with surrogates support this view. One woman said she felt more like a caretaker than a mother. She felt the baby was God's, not her own. "I just never felt the same toward him that I did toward my own sons." Beck, *supra* note 3, at 135. Others have admitted they feel an emotional bond, but that it is kept in perspective because they know they are providing a service. Markoutsas, *supra* note 3, at 100. The Surrogate Parenting Association in Louisville discourages single, childless women from being surrogates because of the possible emotional bond. *Id.* at 104.

[64]Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) at 3013.

[65]*See Adoption and Foster Care, 1975, supra* note 2.

[66]*See* notes 110-67 *infra* and accompanying text.

[67]The Surrogate Parenting Association screens all potential surrogates and couples before they enter the contract. Parties must undergo complete physicals and an examination of their genetic history, as well as psychological evaluations to determine their emotional stability and motivation. Markoutsas, *supra* note 3, at 104.

C. *Indiana Public Policy*

The United States Supreme Court has recognized the importance and integrity of the family unit, giving it protection under the fourteenth amendment.[68] The "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[69] As a result, the nature of the family and the personal decision to have children are protected constitutional interests, subject to regulation only when a compelling state interest so dictates.[70]

Indiana's interest in promoting the family unit is demonstrated by Indiana statutory and case law. Preservation of the family and protection of the child are evident throughout the family law statutes. Indiana adoption statutes provide for protection of the natural parent's rights when those rights are terminated involuntarily, protection of the adopting couple or "new" family unit, and protection of the child.[71] The primary concern in a custody action is the child's best interests,[72] and one of the stated purposes of the Juvenile Code is "to strengthen family life by assisting parents to fulfill their parental obligations."[73] Thus, family law statutes attempt to promote the family structure and protect the child.

The importance of the family in Indiana is also demonstrated by the divorce laws. Impotency at the time of the marriage is a ground for divorce under Indiana's "No-Fault Divorce" statute.[74] That the legislature has specifically identified impotency as a ground for divorce reflects the state's public policy on the importance of children to a marriage.

The courts also have shown a deference to the family unit coupled with a desire to preserve the family and protect the best interests of the child. In *In re Joseph*,[75] an Indiana appellate court said "[a] fundamental right to family integrity means that our federal constitution, as a matter of substantive due process, protects the private ordering of interpersonal relationships from state intrusion."[76] At the same time, the case indicates that the court does

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[68]Stanley v. Illinois, 405 U.S. 645 (1972).

[69]Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974).

[70]*See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[71]IND. CODE § 31-3-1-6 (Supp. 1981); *Id.* § 31-6-5-1. For cases applying the adoption laws see Graham v. Star, 415 N.E.2d 772 (Ind. Ct. App. 1981); *In re* Hewitt, 396 N.E.2d 938 (Ind. Ct. App. 1979).

[72]IND. CODE § 31-6-6.1-11 (Supp. 1981).

[73]*Id.* § 31-6-1-1(5).

[74]*Id.* § 31-1-11.5-3(a)(3).

[75]416 N.E.2d 857 (Ind. Ct. App. 1981).

[76]*Id.* at 859.

have a compelling interest in protecting the best interests of a child.[77] The courts have acknowledged, however, that this protection requires flexibility. The court in *Collins v. Gilbreath*,[78] said that "[w]hen the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided."[79]

The *Collins* court allowed a stepfather visitation rights despite the natural father's objections. The natural father had been given custody after the natural mother's death. In granting the stepfather visitation rights, the court refused to apply the general rule that third party visitation will be denied if the natural parent objects.[80] Instead, the court examined the relationship between the children and the stepfather and found that denying visitation would be unfair to both the children and the stepfather.[81] *Collins* demonstrates the Indiana courts' willingness to explore the benefits of different family relationships without blindly following general rules. Therefore, Indiana courts may be willing to examine the underlying benefits and problems of a surrogate arrangement instead of arbitrarily applying the label "child selling" to the contract.

As previously discussed, the surrogate mother arrangement has the potential to enhance and strengthen the family. There are, however, some negative aspects. The moral and psychological issues surrounding the surrogate arrangement are not within the scope of this Note,[82] but a primary legal concern is whether the child's best interests are being served by the surrogate arrangement.

One major drawback to allowing surrogate contracts is the probability that the child will be born illegitimate. If the surrogate mother is single, the child would definitely be illegitimate.[83] If the surrogate mother is married, there is a statutory presumption that her husband is the child's natural father,[84] making the child legitimate.[85] This statutory presumption is based on Indiana's policy of protecting the child in order to allow it the social acceptance

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[77]*Id.* at 861.

[78]403 N.E.2d 921 (Ind. Ct. App. 1980).

[79]*Id.* at 923.

[80]*Id.*

[81]*Id.*

[82]The same moral arguments used for AID and abortion could be applied to the surrogate mother. Psychological screening and evaluation would solve some of the psychological concerns. *See* note 67 *supra.*

[83]10 C.J.S. *Bastards* § 1 (1938).

[84]IND. CODE § 31-6-6.1-9 (Supp. 1981). Married surrogates are preferred over single women. *See* note 63 *supra.*

[85]R.D.S. v. S.L.S., 402 N.E.2d 30, 31 (Ind. Ct. App. 1980).

associated with legitimacy.[86] However, the presumption of legitimacy may be rebutted by "direct, clear, and convincing evidence."[87] Such evidence may be proof that the husband was impotent, sterile, or had no access to the mother.[88] In *H.W.K. v. M.A.G.*,[89] the court found the testimony of the mother regarding sexual intercourse with the putative father, coupled with the probability of conception at that time, to be sufficient evidence to rebut the presumption that the husband was the father of the child.[90] Although lack of access seems to be an important factor,[91] the existence of a surrogate contract also would be strong evidence to rebut the presumption of legitimacy.[92] Consequently, even if the surrogate is married, the child would still be illegitimate.

That the surrogate contract could be promoting the conception of illegitimate children is a public policy concern. If the couple refuses to adopt the child, this probability of illegitimacy could affect the child's inheritance rights[93] and child support in the event of a divorce between the surrogate and her husband.[94] Although this is a serious consideration, the surrogate agreement, to a large extent, can preclude the problem. Indiana law allows paternity to be established prior to birth.[95] If paternity were acknowledged in the contract and established in a court action prior to birth, then the child, who would be illegitimate at birth,[96] would have the same legal protection afforded legitimate children; that is, the child would be entitled to child support[97] and inheritance rights[98] through the biological father. Of course, once the child is adopted by the couple, they have legal responsibility for the child's support[99] and the child

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[86]L.F.R. v. R.A.R., 269 Ind. 97, 100, 378 N.E.2d 855, 857 (1978); R.D.S. v. S.L.S., 402 N.E.2d 30, 31 (Ind. Ct. App. 1980) (Buchanan, J., dissenting).

[87]R.D.S. v. S.L.S., 402 N.E.2d at 31.

[88]H.W.K. v. M.A.G., 426 N.E.2d 129, 131-32 (Ind. Ct. App. 1981).

[89]426 N.E.2d 129 (Ind. Ct. App. 1981).

[90]*Id.* at 133.

[91]*Id.* at 132.

[92]Part of the fee paid to the surrogate is compensation for loss of consortium. *See* Markoutsas, *supra* note 3, at 104.

[93]*See* IND. CODE § 29-1-2-7 (1976).

[94]*See* IND. CODE § 31-1-11.5-12 (Supp. 1981). This section provides that a parent must pay support for a child of the marriage. Indiana Code section 31-1-11.5-2(c) defines "child" as a child of "*both parties* to the marriage." *Id.* (Supp. 1981) (emphasis added). If the child is not the husband's either biologically or by adoption, he has no duty to pay support. R.D.S. v. S.L.S., 402 N.E.2d at 34.

[95]IND. CODE § 31-6-6.1-2 (Supp. 1981).

[96]*See* notes 83-92 *supra* and accompanying text.

[97]IND. CODE § 31-6-6.1-10 (Supp. 1981).

[98]IND. CODE § 29-1-2-7 (1976).

[99]*See* note 94 *supra*.

can inherit through them.[100] Therefore, by establishing paternity prior to birth, one of the major drawbacks to the surrogate mother contract can be eliminated. In addition, the best interests of the child would be ensured, and the social stigma associated with illegitimacy would be eliminated.[101]

Another policy consideration is ensuring that the child will have a home that is both emotionally and financially suitable. Because the state can regulate surrogate mother contracts just as it regulates ordinary adoption proceedings,[102] this concern can be eliminated through appropriate legislation. Even without additional legislation, the courts can supervise surrogate arrangements on the basis that court approval is required for the fee paid to the surrogate.[103] Further, because the child will be with its natural father, there will be a blood relationship in addition to the legal one of adoption. Thus, the very nature of the arrangement serves to ensure that the child's best interests are served, while helping to promote the family unit.

A contract made among three consenting adults that does not violate existing law or public policy should be upheld. The surrogate mother contract neither violates any of Indiana's statutes, nor seems to violate the state's public policy. On the contrary, the surrogate mother arrangement is capable of furthering the state's policy of strengthening families. The surrogate mother, like the artificial insemination donor, is providing a service which enables a couple to have a child and form a family unit.

The Indiana courts have said that the power of the court to declare a contract void for being in contravention of public policy "should be exercised only in cases free from doubt."[104] It also has been said that public policy must change with the times.[105] It is time to distinguish the surrogate arrangement from black market adoptions and baby selling, and to recognize the surrogate mother arrangement as a new method of reproduction that deserves the same constitutional protections accorded other family matters.

In *Schleiffer v. Meyers*,[106] the United States Court of Appeals

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[100]IND. CODE § 29-1-2-8 (1976).

[101]Even if the couple failed to adopt the child, illegitimacy does not carry the same stigma it once did. An increasing number of unwed mothers are now keeping their children. *See Surrogate Parenting*, *supra* note 1, at 58.

[102]*See* IND. CODE § 31-3-1-3 (1976). Legislation legalizing and regulating the surrogate mother contract has been introduced into the Michigan House of Representatives. [1982-1985] REP. H.R.L., *supra* note 8, at 2.

[103]IND. CODE § 35-46-1-9(b) (Supp. 1981).

[104]American Underwriters, Inc. v. Turpin, 149 Ind. App. 473, 477, 273 N.E.2d 761, 764 (1971) (citing Corns v. Clouser, 137 Ind. 201, 204, 36 N.E. 848, 849 (1894)) (quoting Richmond v. Dubuque R.R., 26 Iowa 191, 202 (1868)).

[105]6A A. CORBIN, CORBIN ON CONTRACTS § 1375 (1962).

[106]644 F.2d 656 (7th Cir.), *cert. denied* 102 S. Ct. 110 (1981).

for the Seventh Circuit, recognizing the uniqueness of the family's role in society, said that constitutional principles should be applied with "sensitivity and flexibility to the special needs of parents and children."[107] Although the *Schleiffer* court was dealing with the rights of parents and a child already born, the same constitutional principles should be applied flexibly to a couple's decision to have a child. The couple should be able to enter a surrogate arrangement in order to create a family, subject only to sensitive state regulation.[108] Similarly, the surrogate mother should be able to offer her biological services for a fee, subject to regulation. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[109]

The state does have a compelling interest in seeing that the unborn child's best interests are protected; therefore, regulating the contract is valid. However, the couple and the surrogate have the right to create a child and form a family subject to rational, relevant regulation, not regulation that is unrelated to the nature and terms of the surrogate arrangement. Therefore, profiting from adoption statutes should not be construed as barring surrogate mother contracts.

Additionally, a surrogate mother agreement which includes additional fees to the surrogate should be upheld on the basis of Indiana public policy which places importance on children in the family unit, which allows flexibility in dealing with the family and which shows deference to individual decisions regarding the family. Even if the contract is valid, however, problems still remain with enforcing the contract and with providing a remedy in case of a breach. If a surrogate contract is not valid, the parties may be forced to resort to noncontractual remedies in the event of a breach.

III. Rights and Remedies of the Parties

The possibility of a breach by one party exists in any contractual agreement, but the surrogate mother contract presents some special problems under existing family law. The parties to a surrogate arrangement may breach the contract during three distinct time periods: prior to the artificial insemination, during the pregnancy, and after the baby is born. The remedies available to the parties are dependent upon when the contract is breached and whether the con-

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[107] *Id.* at 660.

[108] *See* notes 171-78 *infra* and accompanying text.

[109] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis deleted).

tract is valid. If the contract is valid, the courts can rely on basic principles of contract law in fashioning remedies. However, noncontractual remedies provided by Indiana family law statutes are available whether the contract is valid or not.

A. Breach of the Contract Prior to Insemination

If the surrogate breaches the contract by refusing to be artificially inseminated, the couple's remedy would be limited. If the contract is valid, the couple can sue for damages and recover expenses incurred such as legal, medical, and travel.[110] It would be difficult, however, to measure the value of their lost expectation. Because there has been no physical harm, the couple would not be able to recover for pain and suffering.[111]Generally, when damages are difficult to measure or the remedies at law are inadequate, equity will specifically enforce a contract.[112] Such a remedy is impossible for a breach prior to insemination because courts are reluctant to specifically enforce personal service contracts.[113] More importantly, forcing a woman to bear a child violates her constitutional right of privacy.[114] Therefore, if the contract is valid, the couple's remedy would be limited to recovery of their expenses.

If the contracting couple breaches by refusing to proceed with the artificial insemination, the surrogate can sue on the contract and recover damages. The measure of damages might be the contract price minus her projected costs because the breach was prior to the surrogate's actual performance of the contract.[115] Although damages are not quite as speculative here as they would be if the surrogate breached, the costs and benefits would be difficult to measure, and specific performance would be impossible because it would violate the donor's right of privacy.[116]

Of course, if the contract were declared illegal or against public policy, the court would leave the parties where it found them. The contract would be void and neither party could receive damages.[117] Because there are no applicable statutes at this point of the transac-

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[110]*See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 15-3, -4 (2d ed. 1977).

[111]*See* McCormick Piano & Organ Co. v. Geiger, 412 N.E.2d 842 (Ind. Ct. App. 1980); Charlie Stewart Oldsmobile, Inc. v. Smith, 171 Ind. App. 315, 357 N.E.2d 247 (1976).

[112]5A A. CORBIN, CORBIN ON CONTRACTS § 1142 (1964).

[113]*See* Lindsay v. Glass, 119 Ind. 301, 21 N.E. 897 (1889); 5A A. CORBIN, CORBIN ON CONTRACTS § 1204 (1964).

[114]*See* Roe v. Wade, 410 U.S. 113, 152-54 (1973).

[115]*See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 14-4 (2d ed. 1977).

[116]*See* note 114 *supra.*

[117]*See* Hogston v. Bell, 185 Ind. 536, 553, 112 N.E. 883, 888 (1916); Hiatt v. Yergin, 152 Ind. App. 497, 510, 284 N.E.2d 834, 841 (1972); Van Orman Fort Wayne Corp. v.

tion, none of the parties have any noncontractual remedies. Thus, for the injured party to recover any damages resulting from a breach of the contract prior to insemination, the contract must be valid.

B. Breach of the Contract During Pregnancy

The possibility exists that the surrogate will breach the contract during the pregnancy by having an abortion. She could do so in the first trimester of the pregnancy without the consent of either her husband or the biological father.[118] The couple's remedy in this situation would be the same as a pre-pregnancy breach; that is, the couple may sue on the contract and recover special damages, which may be greater based on incurred expenses. In addition to the disappointment of not getting a child, the couple would have the pain of knowing the child had been aborted. Some surrogate contracts provide for a tort action of intentional infliction of emotional distress if the surrogate breaches the contract.[119] The couple could attempt to pursue this remedy, but success is doubtful because Indiana requires contemporaneous physical impact before allowing recovery for an action of this type.[120] Consequently, the couple could only recover their actual expenses as damages.

If the contract were declared illegal, the court would refuse to enforce the contract and the couple would receive no damages.[121] Nor would they have any noncontractual remedies because no statutes apply to this situation. Therefore, as in pre-insemination breaches, the contract must be valid for the couple to recover any damages for a breach of the contract during pregnancy.

Because most couples use the surrogate mother as a last resort, it is unlikely the couple would reject the baby in utero and, thus, breach the contract. It is possible, however, that the couple may change their minds, especially if the fetus is unhealthy or has a defect.[122] Although the surrogate could sue on the contract, assuming it is valid, and recover the contract price, this would be an in-

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Edwards Motor Co., 148 Ind. App. 66, 69, 263 N.E.2d 746, 748 (1970). *See generally* 6 I.L.E. *Contracts* §§ 81-84 (1960).

[118]IND. CODE § 35-1-58.5-2(a) (Supp. 1981); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[119] *See Surrogate Parenting, supra* note 1, at 60.

[120]*See* Elza v. Liberty Loan Corp., 426 N.E.2d 1302 (Ind. Ct. App. 1981).

[121]*See* note 117 *supra.*

[122]The surrogate contract may call for the surrogate to submit to amniocentesis to determine whether the fetus is normal. Amniocentesis is a prenatal test to determine the status of the fetus. Amniotic fluid is removed from the amniotic cavity with a needle. The fluid is then analyzed for any abnormalities. H. GRAY, 4B ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 305.13(5) (1981).

adequate remedy if the mother is left with a child she does not want. Consequently, the surrogate's superior option is to seek satisfaction under the following noncontractual statutory remedies, rather than suing on the contract.

The surrogate could abort the fetus if she were in the first trimester of the pregnancy.[123] If abortion is unacceptable to her, or if the pregnancy is too far advanced, she could deliver the child and give it up for adoption.[124] This avenue allows the surrogate to be reimbursed for her medical and legal expenses[125] and also provides satisfaction if the contract is declared illegal.

Another noncontractual remedy would be to establish the child's biological father through a paternity suit.[126] Once paternity is established, the father would be responsible for the surrogate's legal[127] and medical expenses, both prenatal and postnatal.[128] The father would also be liable for child support.[129] Thus, a paternity suit would provide the surrogate with a remedy in addition to damages, under a valid contract, or a remedy in lieu of the contract if it is declared invalid.

Proving paternity is not difficult generally. Indiana courts require that paternity be proven by a preponderance of the evidence.[130] However, in *D.M. v. C.H.*[131], the mother's statement that she had sexual intercourse with the alleged father during the probable time of conception was enough to prove paternity.[132] In *Johnson v. Ross*,[133] the putative father had signed an affidavit acknowledging his paternity; however, during the action for support, both the mother and putative father testified that he was not the father.[134] The court upheld the support order based on the signed affidavit. The court said that the uncontradicted testimony of the parents need not be accepted as true where the duty of support is involved,

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[123]*See* note 118 *supra*.

[124]*See* IND. CODE § 31-3-1-6 (Supp. 1981).

[125]*See id.* § 35-46-1-9(b).

[126]*See id.* § 31-6-6.1-2(a).

[127]*See id.* § 31-6-6.1-18.

[128]*See id.* § 31-6-6.1-17.

[129]*See id.* § 31-6-6.1-10. This Note assumes that a child conceived by artificial insemination would be treated the same as one conceived by sexual intercourse, although Indiana has no statutory or case law on this issue. See notes 176-77 *infra* and accompanying text for a discussion of the treatment of AID in those states adopting the Uniform Parentage Act.

[130]*See* Sandoval v. Hamersley, 419 N.E.2d 813, 817 (Ind. Ct. App. 1981) (Hoffman, J., dissenting).

[131]380 N.E.2d 1269 (Ind. Ct. App. 1978).

[132]*Id.* at 1270.

[133]405 N.E.2d 569 (Ind. Ct. App. 1980).

[134]*Id.* at 572.

especially when the testimony conflicts with prior statements.[135] Consequently, a signed contract by the husband of the couple, stating that he is the biological father, should be sufficient to prove paternity.

A married surrogate would have to rebut the statutory presumption that her husband is the father of her child.[136] As previously noted, though, the terms of the contract and the surrogate's testimony should be sufficient to overcome the presumption.[137]

Once paternity is established, the surrogate can recover her medical and legal expenses and hold the natural father liable for child support even if the contract is invalid. Therefore, if the contract were breached at this point by the couple, the surrogate has the noncontractual remedies of abortion, adoption, and paternity in addition to the possible contract action. If the surrogate breaches, however, the couple is limited to a contract action allowing meager damages and a possible tort remedy.

C. Breach of the Contract After Birth

The most likely time for a breach of the surrogate mother contract is after the baby is born, because the surrogate may decide to keep the baby, or the couple may refuse to accept it. If the couple refuses to accept the child, the surrogate's remedies would be the same as some of the remedies for a breach during the pregnancy. She could sue on the contract, if it were valid, and recover the contract price because she had fully performed her contract obligations.[138] Although these damages would be inadequate, specific performance of the contract would not be possible. Once the baby is born, the best interests of the child are paramount.[139] Forcing the child on unwilling parents would not serve the child's best interests. However, the surrogate would also have the noncontractual remedy of a paternity action for support or of adoption.

If the court views the contract as one for services rendered, the surrogate should be able to recover not only the contract price, but also child support after establishing paternity. If the contract were invalid, either the paternity action or an adoption would allow the surrogate to receive legal and medical fees,[140] but adoption would be

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[135]*Id.* at 572-73.

[136]*See* IND. CODE § 31-6-6.1-9 (Supp. 1981).

[137]*See* notes 87-92 *supra* and accompanying text.

[138]*See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 14-4 (2d ed. 1977).

[139]*See* Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980); Unwed Father v. Unwed Mother, 379 N.E.2d 467 (Ind. Ct. App. 1978).

[140]*See* IND. CODE §§ 31-6-6.1-17,-18 (Supp. 1981); *Id.* § 35-46-1-9(b).

preferable to a paternity action if the surrogate did not want to keep the child. Adoption would avoid a legal suit and still reimburse the surrogate for her out-of-pocket expenses.

At this point, the rights of the child have to be considered. Due to the likelihood that the child would be illegitimate,[141] the couple's refusal to adopt him could threaten his inheritance and support rights.[142] If the child were adopted by someone else, these problems would be cured. However, if the surrogate decided to keep the child, or the child could not be placed in an adoptive home, his rights and interests would need to be protected. Because the child was not a party to the contract, the child or a guardian ad litem could not sue on the contract, even if it were valid.[143] However, the child could institute a paternity action. Indiana paternity law allows a child, his guardian, or next friend to file a paternity suit.[144] Under certain conditions the state or county welfare department may also file an action.[145] Once the child's paternity is established, the putative father may be required to pay support, depending on the result of the court hearing.[146] Establishing paternity would also allow the child to inherit from both his natural mother and father.[147]

If the surrogate breaches the contract by refusing to give up the child, the couple would be in the best position to have the contract specifically enforced in equity. Again, monetary damages would be difficult to measure and would be inadequate. In this situation, both sides would desire the child. By placing the child with the couple, the child would be with his natural father and in a suitable home. Thus, requiring the surrogate to give up custody could serve the best interests of the child and provide a remedy for the breach of contract. However, under current family laws the couple would face several obstacles.

First, although the surrogate may have contracted to give up all parental rights, under the adoption statutes actual consent to adoption cannot be signed until after the child is born.[148] In addition, the courts have refused to broadly interpret the adoption consent statute. In *Krieg v. Glassburn*,[149] the child's grandparents contested

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[141]*See* notes 83-92 *supra* and accompanying text.

[142]*See* notes 93-94 *supra*.

[143]There is no privity of contract between the child and the other parties. *See* 1 A. CORBIN, CORBIN ON CONTRACTS § 124 (1964).

[144]IND. CODE § 31-6-6.1-2(a)(4) (Supp. 1981).

[145]*Id.* § 31-6-6.1-2(b).

[146]*See id.* §§ 31-6-6.1-10, -13.

[147]If the paternity of the child is established by law during the lifetime of the father, the child will be treated the same as a legitimate child for inheritance purposes. *Id.* § 29-1-2-7(b) (1976).

[148]*Id.* § 31-3-1-6(b) (Supp. 1981).

[149]419 N.E.2d 1015 (Ind. Ct. App. 1981).

the adoption of the child. The court said that the adoption statute[150] did not require the consent of noncustodial grandparents; consequently, the court could not impose such a requirement.[151] Therefore, if the surrogate refuses to sign the consent, it is unlikely the court would force her to give up her rights based only on the contract.

The couple could try to have the surrogate's rights terminated involuntarily.[152] However, the court will strictly construe the provision for involuntary termination of parental rights, protecting the natural parent's interests.[153] Before parental rights are involuntarily terminated, it must be shown that continuing parental custody is "wholly inadequate for their [the children's] very survival."[154] Consequently, a court is unlikely to terminate the surrogate's parental rights unless the couple could prove that the surrogate was unfit.

The couple is in a much better position to obtain custody if the surrogate has signed the adoption consent before changing her mind. Although consent may be withdrawn prior to entry of the adoption decree, the court must order the withdrawal based on the best interests of the child.[155] In addition, the burden of proof is on the person seeking to withdraw the consent.[156] Thus, the surrogate would have to prove that the consent was void based on fraud, duress or undue influence, or that it would be in the child's best interests to withdraw the adoption consent.[157]

The courts do not favor the withdrawal of consent. In *In re Snyder*,[158] the court said that allowing a parent to arbitrarily withdraw consent would discourage adoption, making adoptive parents the prey of unscrupulous persons.[159] The court added that "a parent who executes a voluntary relinquishment of parental rights is bound by the consequences of such action, unless the relinquish-

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[150]IND. CODE § 31-3-1-6 (Supp. 1981).

[151]419 N.E.2d at 1020.

[152]*See* IND. CODE § 31-3-1-6(f), (g) (Supp. 1981).

[153]*See In re* Gray, 425 N.E.2d 728, 729 (Ind. Ct. App. 1981). ("With the refusal to give consent, an adoption proceeding becomes adversarial in nature, and the natural parent is entitled to a fair opportunity to establish his or her right to the custody of the child before an impartial tribunal.").

[154]*In re* Miedl, 425 N.E.2d 137, 141 (Ind. 1981).

[155]IND. CODE § 31-3-1-6(f) (Supp. 1981) provides in part that:

> A consent to adoption may not be withdrawn prior to the entry of the decree of adoption unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal.

[156]*See In re* Hewitt, 396 N.E.2d 938, 942 (Ind. Ct. App. 1979).

[157]*See id.*

[158]418 N.E.2d 1171 (Ind. Ct. App. 1981).

[159]*Id.* at 1180.

ment was procured by fraud, undue influence, duress, or other consent-vitiating factors."[160] To prove undue influence, duress, or fraud, the surrogate must show that her own volition was overcome.[161] Emotional stress, tension, or pressure is insufficient "unless they rise to the level of overcoming one's volition."[162] Consequently, the surrogate would have difficulty proving that the consent was involuntary.

In determining the child's best interests in a petition to withdraw consent, the court must treat the interests of all the parties fairly. The judge "must balance the interest of the natural parents and their sacred relationship to their child against the hope, expectation, reliances, and desires of the adoptive parents . . . ."[163] Because the surrogate arrangement involves a natural parent as one of the adoptive parents, the couple's interest should carry more weight than that of a conventional adopting couple. The additional fact that the surrogate entered the agreement with the intent to give up the child should tip the balance in favor of the couple.

To protect their rights, however, the couple should have the husband establish paternity during the pregnancy.[164] He would then have parental rights, such as visitation and custody, when the child is born.[165] If the surrogate attempted to withdraw her adoption consent, the natural father would have a stronger argument for enforcing the consent. More importantly, if the surrogate refused to consent to the adoption, the natural father could file for custody of the child.[166] The parties in the proceeding would be the natural father versus the natural mother, rather than an adoptive parent versus a natural parent.

Indiana makes no presumption favoring one natural parent over the other and determines custody solely on the child's best interests.[167] Although a determination of which custodial parent would serve the child's best interests might be difficult, some weight should be given to the role the surrogate is playing. She entered the agreement intending that the father take the child. Therefore, if the couple is in a position to give the child a suitable home, they should prevail.

Although this procedure might give the couple custody of the

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[160]*Id.*

[161]*See id.*

[162]*In re* Hewitt, 396 N.E.2d at 942.

[163]*Id.*

[164]*See* IND. CODE § 31-6-6.1-2(a)(2) (Supp. 1981). This statute provides that a man claiming to be the father of an unborn child may file a paternity action.

[165]*See id.* § 31-6-6.1-10(a).

[166]*See id.*

[167]*Id.* § 31-6-6.1-11(a).

child, the natural father's wife would not have parental rights to the child without adopting it. The wife would be a stepmother, not the legal mother, unless the surrogate consented to adoption. To avoid some of these pitfalls inherent in a surrogate contract, the parties need to carefully draft a comprehensive agreement. Specific provisions can offer a degree of protection to the parties and can help provide a remedy in the event either party breaches the contract.

IV. Recommended Contract Provisions

To protect all of the parties, a surrogate contract should require the biological father to establish his paternity prior to the birth of the child. The contract should provide for adequate consideration for the surrogate, including insurance benefits for herself and the child. It should also stipulate that the couple will take the child regardless of its condition.[168] To this end, the couple may want to require amniocentesis.[169] If this test is required, the contract should set forth what is to be done if the unborn fetus is defective. Also, the contract should stipulate that the surrogate will make a good faith effort to keep herself and the fetus healthy. Because either party might breach the contract, and damages are so difficult to measure, the parties may want to provide for reasonable liquidated damages.[170]

Although these provisions can protect the surrogate, the couple, and the child to a certain extent, there are some problems the contract cannot resolve due to existing family law. These can only be solved by legislation.

V. Proposed Legislation

The biggest obstacle in Indiana to the surrogate mother contract is the statute proscribing child selling.[171] Although the rationale behind the law does not apply to the surrogate mother situation, the courts might construe the statute as a bar to the contract. Because Indiana public policy supports a strong family unit and the surrogate's services can help create that family, the contract should be valid. The uncertainty of the law, however, leaves the parties entering such an arrangement in a precarious situation. Even if the contract is valid, Indiana's presumption of paternity law[172] creates a problem if the surrogate is married. Another obstacle is the adop-

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[168]The Surrogate Parenting Association contracts require the adopting couple to take the child regardless of its health. *See* Markoutsas, *supra* note 3, at 104.

[169]*See* note 122 *supra.*

[170]*See* J. Calamari & J. Perillo, The Law of Contracts § 14-31 (2d ed. 1977).

[171]Ind. Code § 35-46-1-4(b) (Supp. 1981).

[172]*Id.* § 31-6-6.1-9.

tion statute prohibiting a mother from consenting to adoption prior to the child's birth.[173]

Protecting the child and mother is the policy underlying these statutes. These statutes, however, harm rather than protect the contracting parties and child in the surrogate mother situation. The legislature needs to examine the surrogate mother arrangment and to draft appropriate regulations that deal specifically with it.[174] Prohibiting the arrangement raises constitutional questions of invasion of privacy and unequal protection,[175] although failing to regulate surrogate mothering can jeopardize the interests of all the parties, especially those of the child.

Therefore, the legislature must draft statutes that apply to the surrogate mother arrangement. Exceptions to the presumption of paternity and consent statutes can be applied when a surrogate mother is involved. These exceptions would allow the surrogate to execute a valid consent which terminates her parental rights when the parties first enter the contract, not after the baby is born. An exception to the paternity presumption would make it easier for all parties, including the child, to establish the child's paternity and thus protect its inheritance rights.

The Uniform Parentage Act[176] addresses the status of an artificial insemination donor. It provides, in part, that a "donor of semen provided . . . for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[177] The adoption of this section by Indiana might affect adversely the noncontractual remedies available to the parties to a surrogate mother contract, because the donor would not be considered the natural father, if the surrogate is married.[178] This provision might prevent the couple, the surrogate, and the child from establishing paternity; and, as a result, prevent a custody action by the couple or a support action by the surrogate in the event the contract is breached. If the surrogate is single, however, this provision of the Uniform Parentage Act seems to pose no obstacle because it is specifically directed to married women. The Uniform Parentage Act can serve as a model, however, for appropriate surrogate mother legislation.

Viewing the surrogate mother in the same manner as an artifi-

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[173]*Id.* § 31-3-1-6(b).

[174]*See* [1982-1985] REP. H.R.L., *supra* note 8, at 2 for proposed legislation in Michigan.

[175]*See* notes 42 & 53 *supra.*

[176]9A U.L.A. 579 (Supp. 1982). Eight states have adopted the Uniform Parentage Act. Indiana is not one of them.

[177]*Id.* § 5(b) at 593.

[178]*See generally* Comment, *supra* note 5, at 614; *Surrogate Parenting, supra* note 1, at 59.

cial insemination donor would eliminate many of the legal problems inherent in a surrogate mother contract. That is, if the surrogate were considered only a carrier and not the legal mother of the child, she could not claim parental rights. If the biological father's wife consented to the surrogate arrangement, she could then be deemed the legal mother with parental rights and obligations to the child.[179] This treatment would eliminate the possibility of legal battles between the couple and the surrogate over adoption, paternity and custody. Furthermore, it could serve to make the child legitimate from conception by defining the biological father and his consenting wife as the legal parents. Finally, such a law would ensure that the couple would be liable for the child's care and support from the beginning of the pregnancy.

In addition to the proposed legislation, the state should require the licensing of any agencies specializing in matching surrogates with childless couples. The surrogate contract also should be subject to approval by a court. These provisions would be similar to traditional adoption laws.

All of these legislative proposals for a surrogate mother arrangement would eliminate the legal obstacles posed by existing family law. At the same time, the state would exercise enough control over the contract to protect the interests of all the parties.

VI. CONCLUSION

Indiana law does not create a complete barrier to the surrogate mother contract. A woman can be reimbursed for the legal and medical expenses of pregnancy and childbirth. But, whether she is allowed to receive additional fees will depend on the discretion of the Indiana courts. This Note has attempted to show that the surrogate mother contract does not violate public policy. Rather, it can further Indiana's policy of strengthening the family unit. Consequently, the Indiana courts should uphold the validity of the contract and allow additional fees to the mother.

Indiana's family laws also can help or hinder the contracting parties. While the paternity and adoption laws may protect the child, they also can create legal difficulties for the parties and, ultimately, the child. By drafting regulations that recognize the surrogate mother as providing a service, similar to the artificial insemination donor, the state can exercise control over the arrangement without infringing on the parties' rights of privacy.

BETTE J. DODD

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[179]Uniform Parentage Act § 5(a) treats a consenting husband as the child's natural father. 9A U.L.A. 592 (1979). *See* Keane, *supra* note 4, at 150.

Asbestos Litigation: The Insurance Coverage Question

I. INTRODUCTION

Since the beginning of World War II, an estimated eight to eleven million American workers have been exposed to asbestos.[1] Although asbestos exposure in factories is not as severe a problem today,[2] additional construction and demolition workers will be exposed while doing rip-out and repair work.[3] As a result of asbestos exposure, at least 200,000 asbestos-related deaths are expected by the year 2000.[4] Approximately 20,000 personal injury lawsuits are pending against mining companies, manufacturers, and distributors of asbestos;[5] payments to plaintiff workers may eventually total billions of dollars.[6]

One major battle in the asbestos litigation is between the asbestos manufacturers and their casualty insurers. Because of the insidious nature of asbestos-related diseases,[7] it is medically impossi-

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[1]Vagley & Blanton, *Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation*, 16 FORUM 636, 647 (1981).

[2]The Occupational Safety and Health Act requires the Secretary of Labor and the Occupational Safety and Health Administration to promulgate standards to protect employees from regular exposure to toxic materials. 29 U.S.C. § 655(b)(5) (1976).

[3]4A GRAY'S ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 205C.11(1) (3d ed. 1980) [hereinafter cited as GRAY'S].

[4]Winter, *Asbestos Legal 'Tidal Wave' Is Closing In*, 68 A.B.A. J. 398 (Apr. 1982) (quoting Dr. Irving Selikoff, Director of the Environmental Sciences Laboratory at New York City's Mt. Sinai School of Medicine).

[5]Wermiel, *Top Court Refuses to Hear Insurers' Cases On Liability for Asbestos-Related Disease*, Wall St. J., Dec. 8, 1981, at 10, col. 1. The defendants most often named in these cases are Johns-Manville, Eagle-Picher, Owens-Corning, Pittsburg-Corning, Celotex, Keene Corp., Armstrong Cork Co., Raybestos-Manhattan, and GAF Corp. Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860, 865 (1980). For purposes of this Note, "mining companies, manufacturers and distributors of asbestos" will be, hereinafter, referred to collectively as "manufacturers."

[6]Wermiel, *Top Court Refuses to Hear Insurers' Cases On Liability for Asbestos-Related Disease*, Wall St. J., Dec. 8, 1981, at 10, col. 1. Asbestos also impairs the value of buildings; market values are depressed because the asbestos used in the construction of buildings makes prophylactic repairs necessary to prevent the occupants' exposure to asbestos. Legal action to recover the decreased market value and the cost of repairs is being contemplated in some instances. The New York City Board of Education plans to spend $30 million in remedying the asbestos problem in its schools and is reportedly considering legal action. In light of the extensive use of asbestos in the construction industry, the property damage claims could well surpass the personal injury claims in terms of financial impact. Mansfield, *supra* note 5, at 866.

[7]An insidious disease is defined as one that "progresses with few or no symptoms to indicate its gravity." STEDMAN'S MEDICAL DICTIONARY ILLUSTRATED 711 (23d ed. 1976).

ble to determine, with any accuracy, when an asbestos-related disease develops.[8] Generally, symptoms can not be detected until ten years or more after the initial exposure to asbestos.[9] The standard language in the asbestos manufacturers' comprehensive general liability insurance policies covers injuries which "occur" during the policy period.[10] Consequently, the language of these policies presents serious interpretive problems when applied to asbestos-related diseases. Moreover, many asbestos manufacturers had more than one insurance carrier between the time of the plaintiff's initial exposure to asbestos and the manifestation of the symptoms of the disease. These unique aspects of asbestos litigation present the critical question of which insurance company has the duty to defend and bear the ultimate financial burden.

The insurance coverage question in asbestos litigation has been characterized as the most important litigation of the decade because it will determine the course of thousands of pending and future lawsuits.[11] The resolution of this question, however, may not be limited to the asbestos litigation, but may affect future litigation involving other industrial carcinogens. Furthermore, this litigation will have an impact on the future premium structures and underwriting practices of the casualty and liability insurance industry.[12]

This Note will discuss the background of the coverage dispute and explain why the controversy has arisen. This Note will then compare and analyze the various approaches taken by the courts and discuss the resulting difficulties in formulating long-range strategy to deal with the overwhelming number of lawsuits being filed.

II. BACKGROUND

The underlying tort actions generally involve one of two factual situations. The first is illustrated by the landmark case of *Borel v. Fibreboard Paper Products Corp.*[13] In that case, an insulation

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[8]W. HUEPER, OCCUPATIONAL TUMORS AND ALLIED DISEASES 403 (1942); *see also* S. ROBBINS, PATHOLOGIC BASIS OF DISEASE 514 (1974).

[9]*See* notes 15-17 *infra.*

[10]*See* notes 27-29 *infra.*

[11]Mansfield, *supra* note 5, at 875.

[12]*Id.*

[13]493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). In *Borel* the court held that the manufacturers' failure to adequately warn the ultimate users of their products (insulation workers) of the hazards of asbestos made the product unreasonably dangerous. *Id.* at 1093, 1103. As a result, each defendant manufacturer who contributed to Borel's injuries was jointly and severally liable for the judgment. *Id.* at 1096. For other "insulator" cases, see Migues v. Fibreboard Corp., 662 F.2d 1182 (5th Cir. 1981); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975); Mooney

worker was exposed to insulation containing asbestos at numerous job sites over several years. The other factual setting involves a plaintiff claiming exposure to asbestos while working for a single employer, for several years, in a factory using raw asbestos fibers supplied by numerous asbestos manufacturers.[14]

To compensate parties who are successful in their tort action, the manufacturers have turned to their insurance companies, precipitating this coverage dispute based on the standard comprehensive general liability insurance policy.

A. The Problem

To understand the insurance coverage problem, it is essential to understand the insidious nature of asbestos-related diseases. Inhalation of asbestos fibers can result in various types of diseases; the most common of which are asbestosis,[15] mesothelioma,[16] and bronchogenic carcinoma.[17] These diseases lead to disability and, often times, death.[18] These diseases generally take ten years or more to develop to a point where symptoms appear.[19] A single asbestos fiber can start a fibrogenic process in the lungs which, with a sufficient number of fibers, may develop into asbestosis.[20] Even an extremely brief exposure to asbestos can lead to the development of

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v. Fibreboard Corp., 485 F. Supp. 424 (E.D. Tex. 1980); Velasquez v. Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 159 Cal. Rptr. 113 (1979); Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981).

[14]Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497 (Ky. 1979); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978) (secretary at factory developed mesothelioma).

[15]Asbestosis is the most frequently occurring asbestos-related disease. Symptoms of asbestosis are shortness of breath, chest pains, coughing and clubbing of the fingers. Death may eventually be caused by suffocation. Asbestosis generally does not manifest itself until at least ten years after the initial exposure to asbestos. GRAY'S, *supra* note 3, ¶ 205C.30.

[16]Mesothelioma is a rare cancer of the lining of the chest cavity. It may take 30 to 35 years for mesothelioma to manifest itself, but it is ultimately fatal within two years of manifestation. The tumor may develop with only a very light exposure to asbestos. *Id.* ¶ 205C.72.

[17]Bronchogenic carcinoma does not generally become a problem for at least 15 years after the initial exposure. The risk of developing the carcinoma is greatly increased by cigarette smoking. Very light exposure to asbestos is sufficient to trigger the development of bronchogenic carcinoma. The prognosis for an asbestos-induced carcinoma is no different than for other lung cancers. *Id.* ¶ 205C.71.

[18]For a detailed discussion of the effects of asbestos, see Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967) and Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 139 (1965).

[19]*See* notes 15-17 *supra*.

[20]GRAY'S, *supra* note 3, ¶ 205C.21.

mesothelioma.[21] It is medically impossible, however, to pinpoint the time at which any asbestos-related disease actually developed.[22] Therefore, a judicial determination of when the injury occurred is essential in establishing insurance coverage for that injury. A manufacturer will receive no indemnification for a personal injury judgment against it unless the underlying injury is determined to have occurred within the policy period.[23]

The plaintiffs in the underlying tort suits were typically exposed to asbestos or asbestos products supplied by several manufacturers,[24] each of which periodically switched insurance companies during the years in which workers were exposed.[25] Because it is medically impossible to pinpoint the occurrence of an asbestos-related disease, but necessary to establish coverage, a controversy has arisen as to which of a manufacturer's several insurers, if any, has a duty to defend and indemnify the manufacturer for the asbestos-related diseases.

B. Interpreting the Insurance Policy

Aside from the medical difficulties, resolution of the coverage dispute between the insurance carriers and the manufacturers requires interpretation of the applicable insurance policies. The manufacturers in the asbestos insurance cases purchased comprehensive general liability (CGL) insurance policies that are standardized by the insurance industry.[26] Therefore, the terms of each of the manufacturers' various policies were essentially identical. In a CGL insurance policy, the insurer contractually agrees to:

> [P]ay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as damages because of A. *bodily injury* or B. *property damage* . . . caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking damages on

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[21] *Id.* ¶ 205C.72.

[22] *Id.*

[23] 13 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 46:173 (2d ed. 1964).

[24] *See, e.g.*, Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973).

[25] Wermiel, *Top Court Refuses to Hear Insurers' Cases On Liability for Asbestos-Related Disease*, Wall St. J., Dec. 8, 1981, at 10, col. 1.

[26] *See* notes 46, 60 & 71 *infra*. *See also* Mansfield, *supra* note 5, at 875. A liability policy requires the insurer to make a payment although the insured has not made any payment on the claim for which he is liable. Under an indemnity policy, the insurer must make the insured whole after he has made a payment. 11 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 44:4 (2d ed. 1963). Although technically different, the effect is the same on the insured. Therefore the terms "indemnity" and "liability" will be used interchangeably.

> account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false, or fraudulent . . . .[27]

The policy defines bodily injury as a "sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."[28] Occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury . . . neither expected nor intended from the standpoint of the insured."[29]

Generally, an insurance policy is to be construed and interpreted in the same manner as any other contract.[30] As with any other contract, indemnity or liability provisions should be construed to give effect to the entire contract.[31] Where the insurer has prepared the contract, any ambiguity should be resolved in favor of the insured;[32] however, if the language is clear, this principle of construction is inapplicable, and the terms must be given their common and ordinary meaning.[33] To do otherwise would extend coverage "beyond the plain and natural meaning of the language chosen by the parties."[34] In interpreting a liability or indemnity insurance contract, the court is to consider both the policy's dominant purpose of indemnification and the expectations of the insured.[35]

C. Theories of Interpretation

The determination of when the injury occurred depends upon the characterization of the injury. Essentially the question is whether the injury occurred with exposure to asbestos and the beginning of the fibrogenic process, or whether the injury occurred when the symptoms of disease became evident. This forms the basis of the two interpretations of "bodily injury" offered by parties in asbestos insurance litigation.

1. Manifestation Theory.—The manifestation theory relies on the common and everyday meanings of the terms "disease" and "injury."[36] Under this theory, bodily injury is interpreted as not occur-

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[27]THE DEFENSE RESEARCH INSTITUTE, INC., ANNOTATED COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY 67 (No. 1, 1979).

[28]*Id.* at 66.

[29]*Id.* at 6.

[30]1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:1 (2d ed. 1959).

[31]11 *id.* § 44:5 (2d ed. 1963).

[32]*Id.* § 44:6.

[33]1 *id.* § 15:82 (2d ed. 1959). *See also* 11 *id.* § 44:7 (2d ed. 1963).

[34]11 *id.* § 44:7 (2d ed. 1963).

[35]1 *id.* § 15:22 (2d ed. 1959).

[36]Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 523 F. Supp. 110, 115 (D. Mass. 1981), *aff'd in part*, 51 U.S.L.W. 2025 (1st Cir. June 30, 1982). This theory is ad-

ring until the asbestos-related disease manifests itself.[37] Specifically, bodily injury occurs when the plaintiff first knew or should have known that he had an asbestos-related disease, or on the date of diagnosis, whichever is first.[38] Accordingly, only the carrier on the risk at the date of manifestation would have to defend and indemnify the manufacturer.[39]

The advocates of this theory point out that not all exposure to asbestos results in disease. For instance, some individuals with long exposure periods never develop an asbestos-related disease.[40] Because exposure does not always result in injury, they argue that it would be unreasonable to say that "bodily injury" occurs before manifestation of disease.[41] Furthermore, supporters of the manifestation theory point to medical evidence which indicates that it is impossible to determine with any certainty a correlation between a disease and a specific incidence of exposure.[42] It is also impossible to determine the extent of damage at a particular point in time, nor is it possible to determine the time at which the bodily function is impaired.[43]

The manifestation theory was adopted by the court in *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*[44] The plaintiff, Eagle-Picher, was a manufacturer that used asbestos in some of its products between 1931 and 1971. The defendants were insurance companies which provided Eagle-Picher with primary CGL insurance, first layer excess insurance, and second layer excess insurance[45] during the years 1968 through 1979.[46] Prior to 1968, Eagle-

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vocated by most insurers and Eagle-Picher Industries. Eagle-Picher is the only manufacturer who argues for this theory. Mansfield, *supra* note 5, at 876.

[37]Vagley & Blanton, *supra* note 1, at 652.

[38]Mansfield, *supra* note 5, at 876.

[39]Vagley & Blanton, *supra* note 1, at 652.

[40]*See* Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 523 F. Supp. 110, 115 (D. Mass. 1981), *aff'd in part*, 51 U.S.L.W. 2025 (1st Cir. June 30, 1982).

[41]*Id.*

[42]Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1238 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 102 S. Ct. 686 (1981).

[43]*Id.*

[44]523 F. Supp. 110 (D. Mass. 1981), *aff'd in part*, 51 U.S.L.W. 2025 (1st Cir. June 30, 1982).

[45]Excess insurance is coverage against loss that is not covered by other insurance. The excess insurer is liable only for damages which exceed the coverage provided by the primary policy. 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 62:48 (2d ed. 1966).

[46]Liberty Mutual Insurance Company provided primary coverage from 1968 through 1978. First layer excess insurance was provided by American Motorists Insurance Company from 1973 through 1975. The London Market provided first layer excess insurance after 1975 and provided second layer excess insurance after 1973. 523 F. Supp. at 111, 113, & 119.

Picher was uninsured. In 1977 Eagle-Picher's primary insurer sent notice to Eagle-Picher that the primary policy limits for 1974 and 1975 might be exhausted. Eagle-Picher then forwarded this notice to its excess insurers, one of whom disagreed with the primary insurer's handling of claims under the manifestation theory. Eagle-Picher filed an action seeking a declaratory judgment concerning the rights and obligations of the parties to the insurance contracts.[47]

The court held that coverage under the policies is triggered at the time the accumulation of asbestos fibers in the lungs produces a diagnostic asbestos-related disease.[48] The court defined "manifestation" as the date of actual diagnosis or as the date of death if no prior diagnosis was made.[49] The court's decision was based on the medical evidence and the parties' expectations.[50] The court pointed to medical evidence which indicated that exposure to asbestos does not produce instantaneous, subcellular changes and that development of disease is not inevitable.[51] The court said that to "characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word 'injury' in the context of a liability insurance policy."[52] The court also stressed the expectations of the parties. Eagle-Picher did not use asbestos after 1971 but continued to purchase insurance. The court said that because there was minimal possibility of future exposure, but that claims for past exposure would continue, Eagle-Picher obviously thought it was purchasing coverage for past exposure.[53]

2. Exposure or Prorata Theory—The advocates of the exposure theory argue that the first exposure to asbestos results in a physiological change in the lungs which should be treated as a bodily injury.[54] Exposure advocates rely heavily on medical evidence concerning the progressive nature of asbestos-related diseases.[55] However,

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[47]523 F. Supp. at 111-12. Eagle-Picher has been named as a defendant in over 5,000 products liability suits for asbestos-related injuries. *Id.* at 111.

[48]*Id.* at 115.

[49]*Id.* at 118. The judgment did not require that the damages be prorated because of its reliance on the manifestation theory. *Id.* On appeal the First Circuit Court of Appeals held that disease results when it becomes clinically evident. 51 U.S.L.W. 2025 (1st Cir. June 30, 1982).

[50]523 F. Supp. at 115, 118.

[51]*Id.* at 115.

[52]*Id.*

[53]*Id.* at 118. Because one cannot generally purchase insurance for past occurrences or casualty, the court surely meant Eagle-Picher expected that a manifestation theory would be applied to cases of disease that were latent at the time the policies were purchased.

[54]Mansfield, *supra* note 5, at 876.

[55]Vagley & Blanton, *supra* note 1, at 652.

the exposure advocates disagree on the issue of the insurer's liability. This disagreement has divided the exposure theorists into two basic groups based upon differing characterizations of the diseases.

One group of exposure theorists argues that each substantial exposure to asbestos dust triggers coverage.[56] Under this approach, each insurer on the risk during the period of exposure is jointly and severally liable to defend and indemnify. Thus, if a worker was exposed during the years 1942 through 1946, the insurance company or companies covering this period would be liable even if the symptoms of the disease did not appear until 1975.[57] This formulation of the exposure theory is essentially that which the Sixth Circuit adopted in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*[58]

Forty-Eight Insulations manufactured products containing asbestos from 1923 until 1970.[59] By the summer of 1979, Forty-Eight Insulations had become the target of over 1,300 products liability suits. During the years it manufactured asbestos products, Forty-Eight Insulations had purchased numerous CGL insurance policies from five insurance companies.[60] One of Forty-Eight Insulations' insurers brought a diversity action seeking a declaratory judgment of the carriers' obligations under the policies.[61] The Court of Appeals for the Sixth Circuit affirmed the trial court judgment and adopted a version of the exposure theory whereby the initial exposure to asbestos dust triggered coverage.[62] All insurers on the risk from the plaintiff's initial exposure until his last exposure were held liable.[63]

In reviewing the case, the appellate court relied on basic rules of contract interpretation.[64] The court said that the words "bodily in-

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[56]Mansfield, *supra* note 5, at 876.

[57]*Id.*

[58]633 F.2d 1212 (6th Cir. 1980).

[59]*Id.* at 1214. Forty-Eight Insulations and other manufacturers began cutting back on the use of asbestos in the 1960's because of the large numbers of workers who had contracted asbestosis. *Id.* at 1215.

[60]Those companies were: Insurance Company of North America (Oct. 31, 1955 to Oct. 31, 1972), Affiliated FM Insurance Company (Oct. 31, 1972 to Jan. 10, 1975), Illinois National Insurance Company (Jan. 10, 1975 to Jan. 12, 1976), Travelers Indemnity Company of Rhode Island (Jan. 12, 1976 to Nov. 8, 1976), and Liberty Mutual Insurance Company (after Nov. 8, 1976).

[61]633 F.2d at 1216.

[62]*Id.* at 1223.

[63]*Id.* at 1224-25.

[64]*Id.* at 1218-23. The manifestation proponents relied heavily on analogy to cases dealing with statutes of limitations, workmen's compensation and health insurance. In insidious disease and latent injury cases where the statute of limitations is dispositive, the courts have generally applied a discovery of injury rule. The manifestation proponents argued that such cases supported the use of a manifestation rule in their insurance coverage case. The court rejected this argument, saying that the cases were only minimally relevant. The court said that the discovery of injury rule for statute of

jury" and "occurrence" are ambiguous when dealing with an insidious disease such as asbestosis.[65] Because of that ambiguity, the court was free to apply rules of construction and "resolve doubts in favor of maximizing coverage."[66]

The other group of exposure theorists argues that because asbestos fibers, once having reached the lungs, remain lodged and cause progressive, insidious, and continuous harm, each carrier on the risk from the initial exposure until manifestation is obligated to defend and indemnify the manufacturer.[67] In other words, if the worker was exposed to asbestos from 1942 to 1946, all insurers from 1942 through 1976, when the lawsuit was filed, would be liable to defend and indemnify, even though the plaintiff's last exposure was in 1946.[68] This group argues that liability should be determined by a

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limitations purposes is based on policy considerations reflecting a desire to avoid the barring of meritorious claims of plaintiffs unaware of an injury of disease when it first develops. Because the use of the word "injury" in the statute of limitations cases performs a different function than in the context of a CGL insurance policy, the court rejected the argument. *Id.* at 1220.

The court also found the workmen's compensation cases relied on by the manifestation advocates largely irrelevant. Those cases had held the last insurer of the last employer liable for workmen's compensation where a worker was disabled by a progressive, insidious disease. The court said that the "last employer" rule in those workmen's compensation cases was based on the "overriding importance of efficient administration in this area." *Id.* at 1221 (quoting Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955)). The need for efficiency was insufficient to override the rules of contract interpretation already cited by the court.

The court found the health insurance cases cited by the manifestation advocates the most relevant because the problem in those cases was to determine when a disease begins in order to decide whether it began during a policy period. In the health insurance cases cited, the courts determined that there is coverage of the disease even if the disease can be traced to a time prior to the policy period. The manifestation proponents argued that these cases supported a manifestation rule in their case at bar. The court held that the expectations of the insured required a manifestation rule in the health insurance cases, and that those same expectations of coverage required an exposure rule in the case before it. 633 F.2d at 1221-22.

[65]633 F.2d at 1222.

[66]*Id.* In a dissenting opinion, Judge Meritt argued for the "discoverability rule." Under that rule asbestosis would occur ten years from the date of first exposure. Subsequent exposures would be additional compensable injuries. Liability would be prorated among any carriers on the risk ten years after the initial exposure, or during the exposures after the ten years. *Id.* at 1230-31.

The next case to deal with the exposure-manifestation dispute was Porter v. American Optical Corporation, 641 F.2d 1128 (5th Cir.), *cert. denied*, 102 S. Ct. 686 (1981). *Porter* involved a products liability action against the manufacturer of a defective respirator for damages resulting from Porter's asbestosis contracted while supposedly protected by the respirator. The court dealt with the insurance coverage issue by simply following *Forty-Eight Insulations* and applying the exposure theory. 641 F.2d at 1145.

[67]Mansfield, *supra* note 5, at 876-77.

[68]*Id.* at 877.

prorata formula based on the number of years of coverage in relation to the duration of the exposure period.[69]

The most recent, and most controversial, case in the coverage dispute litigation is *Keene Corp. v. Insurance Co. of North America.*[70] From 1948 through 1972, Keene manufactured thermal insulation products containing asbestos. Keene had purchased CGL insurance policies from four different insurance companies from 1961 through 1980.[71] Keene filed a declaratory judgment action seeking a determination of the extent to which each policy covered its liability for asbestos-related injuries. The district court followed *Forty-Eight Insulations* and adopted the exposure theory.[72]

The Court of Appeals for the District of Columbia reversed the district court and remanded the case for determination of damages.[73] The appellate court refused to choose either a manifestation or an exposure theory and held that the actual exposure to asbestos, exposure in residence (subsequent development of disease), and manifestation all triggered coverage under the policies.[74] Under this approach, the court found that each insurer on the risk between the claimant's initial exposure and the manifestation of his disease was liable to Keene for indemnification and defense costs.[75] The court said this was necessary because any other result would undermine the security Keene thought it had obtained by purchasing the policies.[76]

The *Keene* court, like the Sixth Circuit in *Forty-Eight Insulations*, found that the policy language was ambiguous when applied to asbestos-related diseases.[77] This left the court free to interpret the policies, allowing it to use the reasonable expectations of Keene as a guide.[78] The court first discussed the manifestation theory. The court said that Keene, in purchasing the policies, expected to be

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[69]Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1042 n.15 (D.C. Cir. 1981).

[70]667 F.2d 1034 (D.C. Cir. 1981).

[71]Those companies were: Insurance Company of North America (Dec. 31, 1961 to Aug. 23, 1968), Liberty Mutual Insurance Company (Aug. 23, 1967 to Aug. 23, 1968 and Oct. 1, 1974 to Oct. 1, 1980), Aetna Casualty and Surety Company (Aug. 23, 1968 to Aug. 23, 1971), and Hartford Accident and Indemnity Company (Aug. 23, 1971 to Oct. 1, 1974). *Id.* at 1038.

[72]513 F. Supp. 47, 50-51 (D.D.C.), *rev'd and remanded*, 667 F.2d 1034 (D.C. Cir. 1981).

[73]Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1039 (D.C. Cir. 1981).

[74]*Id.* at 1042-47. "Bodily injury" was interpreted by the court "to mean any part of the single injurious process that asbestos-related diseases entail." *Id.* at 1047.

[75]*Id.* at 1041.

[76]*Id.* at 1045-46.

[77]*Id.* at 1041.

[78]*Id.*

covered for all future liability.[79] Because Keene's reasonable expectations were the guide, the court held that manifestation would have to trigger coverage.[80] The court, however, stated that if manifestation were the sole trigger of coverage, the insurance companies would bear only a fraction of Keene's total liability.[81] This result would also undermine Keene's expectations of protection.[82] To fully secure Keene's rights under the policies, the court found it necessary to hold that coverage was triggered by exposure and exposure in residence as well as manifestation.[83]

The exposure theorists are also split on the issue of the manufacturer's participation in defense and judgment liability for periods during which the manufacturer was not covered by insurance.[84] The insurance companies argue that the manufacturer should participate in paying defense and indemnity costs for uninsured periods on the same prorata basis as any insurer.[85] Predictably, the manufacturers argue that the obligations of the insurers, especially with respect to the duty to defend, preclude any participation by the manufacturer in paying any of the defense or indemnity costs.[86]

When a court determines that some sort of exposure triggers coverage under the insurance policies, as in *Keene* and *Forty-Eight Insulations*, it must then determine the extent of that coverage, and how to allocate liability if more than one policy is triggered.

D. Extent and Allocation of Coverage

Under the *Keene* approach, any part of the development of the disease will trigger coverage; therefore, only a part of a claimant's disease may have developed during the period of time covered by a particular policy.[87] To a lesser extent, this is also true under the exposure approach adopted in *Forty-Eight Insulations*.[88] Because of this, insurers advocating the exposure theory have argued for pro-

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[79]*Id.* at 1044.

[80]*Id.*

[81]*Id.* at 1045-46. This conclusion was based on the expectation that many cases will be filed in the future for diseases that have not yet manifested, but will manifest in the future. *Id.* at 1045. Apparently underlying that thought is an expectation that Keene would be unable to purchase insurance to cover diseases that manifest in the future for past exposures.

[82]*Id.* at 1046.

[83]*Id.* at 1046-47.

[84]Mansfield, *supra* note 5, at 877.

[85]*Id.*

[86]*Id.*

[87]667 F.2d at 1047.

[88]633 F.2d at 1226.

rata liability.[89] With prorata liability, the extent of an insurer's liability would be determined by the duration of the claimant's exposure to the manufacturer's products during that insurer's policy period, in relation to the total duration of the claimant's exposure to the manufacturer's products.[90]

The Sixth Circuit in *Forty-Eight Insulations* accepted this argument and did prorate liability among all of the insurers who were on the risk during the plaintiff's actual exposure.[91] In addition, the manufacturer was treated as self-insured for uninsured periods, and thus responsible for its prorata share of the exposure.[92] However, the court explicitly rejected a scheme to prorate liability over a period of time including exposure and exposure in residence because the policy definition of "occurrence" referred to "*continuous or repeated exposure to conditions*."[93] By applying a prorata formula to determine the extent of liability, the court also allocated liability among all carriers on the risk during exposure.[94]

The court in *Keene* rejected the prorata argument.[95] The court ruled that once coverage is triggered, each insurer is liable for the judgment to the full extent of its policy limits.[96] This conclusion was partially based on the fact that there was no provision in the policies for a reduction of the insurer's liability if the injury occurred only in part during a particular policy period.[97] Furthermore, the court found that the prorata scheme would undermine the security Keene expected from an insurance policy; full protection for Keene would be contingent upon the existence and validity of all previous and subsequent policies.[98]

Under the *Keene* approach, it is likely that more than one insurer's policy will be triggered. Therefore, it becomes necessary to allocate liability among the insurers whose policies are triggered.[99] The court did not allocate liability; rather, the court held that Keene could choose to collect the full policy limit from any insurer whose policy was triggered. The selected insurer would then be able to avail itself of the "other insurance" provisions contained in the contracts.[100]

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[89]667 F.2d at 1047.
[90]*Id.*
[91]633 F.2d at 1224.
[92]*Id.*
[93]*Id.* at 1226.
[94]*Id.*
[95]667 F.2d at 1047-50.
[96]*Id.* at 1050.
[97]*Id.* at 1048.
[98]*Id.* at 1047-48.
[99]*Id.* at 1050.
[100]*Id.* These provisions usually contain a formula for allocating liability where more

The other instance in which extent of coverage becomes an issue is the possibility of stacking policy limits. Forty-Eight Insulations had twelve different insurance policies from 1955 through 1977. If the limits of each of the twelve policies are added together, the combined aggregate is $5.6 million per injured person.[101] If each exposure to asbestos is deemed a discrete and separate injury, as some have argued, then each case of asbestosis would not be a single injury, but many injuries. If each injury were then compensated, "stacking" coverage limits would result and give an aggregate limit many times the $5.6 million for a single case of disease.[102] Both the district court and the appellate court in *Forty-Eight Insulations* agreed that such stacking of limits would give Forty-Eight Insulations more insurance than it paid for.[103] Each insurer's liability was limited to the maximum "per occurrence" limit provided for in its policy.[104] The *Keene* court, also concerned with stacking, held that only one policy's limits can apply to a single injury, although it also held that Keene may select that policy.[105]

E. The Duty to Defend

Under an exposure theory which triggers the coverage of more than one policy, it is necessary to determine which insurer or insurers has the duty to defend the insured in the underlying tort action. Under the manifestation theory the carrier on the risk at the time of manifestation is liable for damages and has the duty to defend.

The standard CGL insurance policy contains a duty to defend clause.[106] This provision means that the insurer, as partial consideration for the premium, is obligated to arrange for and pay the expenses incurred in the defense of any action alleging liability which is covered by the policy to indemnify.[107] These defense costs are in addition to the stated limit of the insurer's liability contained in the policy.[108] The duty to defend, much broader than the duty to indemnify, extends to actions that are "groundless, false, or fraudulent."[109]

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than one policy covers a single occurrence. *Id.* n.35. In the absence of such a provision the loss is usually prorated. 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 62:2 (2d ed. 1966).

[101]633 F.2d at 1226 n.28.

[102]*Id.*

[103]*Id.*

[104]*Id.*

[105]667 F.2d at 1049-50.

[106]*See* note 27 *supra* and accompanying text.

[107]Kircher & Quinn, *Insurer's Duty to Defend—An Overview*, in INSURER'S DUTY TO DEFEND 7 (Defense Research Institute, Inc. 1978).

[108]15 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 56:15 (2d ed. 1966).

[109] Kircher & Quinn, *supra* note 107, at 8.

In light of the high costs of defending thousands of products liability suits, it is obvious why the determination of who has the duty to defend is an important one.

In *Forty-Eight Insulations* the costs of defense were apportioned over the entire period during which the alleged injuries occurred.[110] In doing this, the court relied on the same rationale which it used to apportion indemnification costs. Thus, the duty to defend and the duty to indemnify were coextensive.[111] Forty-Eight Insulations was held liable for its prorata share of defense costs that were readily apportionable among covered and noncovered counts in the complaint.[112]

The *Keene* court, in determining the duty to defend, also followed the rationale it used to determine the duty to indemnify.[113] Thus, each insurer whose policy coverage was triggered was also fully responsible to provide a defense.[114] As with indemnification costs, Keene may select which insurer will defend each case.[115] However, the court stated that the insurer selected to defend does not have to be the one whose policy limits determine the extent of indemnification.[116] This duty of an insurer to defend is also subject to "other insurance" provisions.[117]

III. Comparison and Analysis of Theories

The effect of the manifestation theory is to place losses in more recent policy years because it is in those years that the bulk of the asbestos-related diseases, currently being litigated, manifested themselves. Carriers currently on the risk will be liable under the manifestation theory for diseases now being diagnosed, and therefore, those carriers must dramatically increase premiums for CGL insurance.[118] Some fear that the adoption of a manifestation rule will result in no insurance coverage in the future because insurers will refuse to cover manufacturers with large pools of potential victims of industrial disease.[119] One advantage, however, is that

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[110]633 F.2d at 1224.

[111]*Id.* at 1225.

[112]*Id.*

[113]667 F.2d at 1050.

[114]*Id.*

[115]*Id.* at 1051.

[116]*Id.* n.38.

[117]*Id.* at 1050 n.37.

[118]Mansfield, *supra* note 5, at 867.

[119]Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1230 (6th Cir. 1980) (Merritt, J., dissenting), *cert. denied*, 102 S. Ct. 686 (1981).

the manifestation rule is easy to apply and makes for an expeditious resolution of the problem.[120]

In contrast, the exposure theory spreads losses back over numerous years of insurance coverage, thereby avoiding the dramatic increases in premiums to the manufacturers.[121] Because the exposure theory, as adopted by the Sixth Circuit in *Forty-Eight Insulations*, spreads liability and costs proportionally among all insurers on the risk at the time the plaintiff was exposed, applicable primary limits will not be as rapidly exhausted as under the manifestation theory.[122] The triple trigger theory of *Keene* has aspects of both exposure and manifestation theory, but if followed by other courts, this theory would have an impact more like that of the manifestation theory. The reason for this is that the manufacturer will most likely assign claims to recent insurers whose policies have higher limits. Like the manifestation theory, this will place losses in more recent policy years.

It is sometimes difficult to predict which theory of insurance coverage will be advocated by a particular party in this coverage litigation. The facts of the underlying tort action concerning dates of exposure and manifestation will influence which theory a manufacturer or insurer will advocate. But other factors complicate the analysis, and make long-range plans impractical and difficult to make.

The primary coverage limits of CGL insurance policies have historically been low. For example, in the 1950's, Forty-Eight Insulations was covered by a $100,000 per occurrence primary limit.[123] At that time, this amount was probably sufficient, but when today's large judgments are prorated under an exposure theory back over such a low coverage policy, the $100,000 limit does not give the policyholder a great deal of protection. After 1976, Forty-Eight Insulations had purchased $1 million in primary coverage. Under the same exposure theory, this high coverage is useless because little or no exposure occurred in the late 1970's. However, because of annual aggregate limits in the policies, Forty-Eight Insulations generally would fare better under an exposure theory than under manifestation because it can prorate the cost of one injury over several policies. Each insurer is liable to the limits of its policy, even if those limits are low; therefore, Forty-Eight Insulations would receive more coverage. Under the manifestation theory, only the limits of

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[120]Vagley & Blanton, *supra* note 1, at 652.

[121]Mansfield, *supra* note 5, at 877.

[122]*Id.*

[123]633 F.2d at 1227.

the one policy in force at the time of diagnosis would apply to the injury.

Under the exposure theory, liability is usually spread pro rata among several insurers, but the manufacturer may be uninsured for periods of time. Under an exposure theory these gaps in coverage may leave a manufacturer liable for large portions of a judgment. For example, *Forty-Eight Insulations* holds the manufacturer liable for a prorata share of costs based on those uninsured periods. Under the manifestation theory these gaps in coverage would be no problem so long as the diseases manifest themselves during a covered period. Gaps in coverage would also present no problem under the approach used by *Keene* because a manufacturer may assign the entire claim to a single insurer, and the manufacturer would not be liable for any portion of the judgment. Of course under no theory will the manufacturer be protected if the exposure, development of disease, and manifestation occur outside a policy period. This, however, is unlikely to have occurred in the cases now being filed and litigated.[124]

IV. An Alternative

Asbestos manufacturers now have three conflicting court rulings

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[124]Lawsuits filed by manufacturers against third parties seeking indemnification or contribution have further complicated the asbestos litigation. *See, e.g.*, White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981). In the *White* case, Johns-Manville filed suit against the Newport News Shipbuilding and Drydock Company seeking indemnification for liability established in an earlier suit. In that earlier suit, Johns-Manville had been found liable to Newport News employees who installed insulation in Navy ships. In *White*, Johns-Manville argued that Newport News was a sophisticated industrial purchaser who had impliedly warranted that it would use due care in handling the asbestos, and that Johns-Manville was the third party beneficiary of a warranty between Newport News and its employees to provide a safe workplace. *Id.* at 246. Johns-Manville also argued that Newport News was primarily and actively negligent, and that Johns-Manville had been secondarily and passively negligent. *Id.* at 246, 249. Johns-Manville was unsuccessful because the court found that no such alleged warranties existed in the law and that the primary/secondary negligence concept was inapplicable to the facts of the case. *Id.* at 248-50. Although this suit failed, more of these suits can certainly be expected as manufacturers search for ways to spread their losses.

A major target of the third party claims has been the United States because of the extensive use of asbestos in the construction of Navy ships. Glover v. Johns-Manville, 662 F.2d 225 (4th Cir. 1981). The government allegedly required asbestos to be used long after the dangers of asbestos were known. *See* Mansfield, *supra* note 5, at 871-72. Some claims have also been filed against local and international unions. These claims allege that the unions knew of the hazards of asbestos, but that members were not informed, and the union officials used their knowledge of the hazards to win their members some of the highest wages in the construction industry. *See* Mansfield, *supra* note 5, at 871-72.

to explain how their insurers should pay products liability losses for latent disease caused by asbestos. *Forty-Eight Insulations* holds that all insurers that provide coverage when a claimant is exposed to asbestos must defend and indemnify. *Eagle-Picher* assigns defense and indemnity costs to the insurer on the risk when the claimant's disease manifested itself. Under *Keene*, inhalation exposure, exposure in residence, and manifestation all trigger coverage. Each case maximized coverage for the insured manufacturer due to the factual background peculiar to each of these lawsuits. However, these cases result in inconsistent determinations of when bodily injury occurred. Such inconsistency in court rulings makes it impossible for either manufacturers or insurers to know how to proceed in the pending and future asbestos litigation.

If proposed liability theories are followed[125] and plaintiff asbestos workers win judgments, the cost of asbestos disease will be placed on the asbestos industry. The asbestos industry, in turn, has shifted that potential risk to the insurance industry through the purchase of CGL insurance policies. The Court of Appeals for the District of Columbia went the farthest in shifting the burden of the asbestos litigation onto the shoulders of the insurance industry. Under *Keene*, when a latent disease claim is presented, the manufacturer can assign that claim to an exposure or manifestation year when high limits were in force. As a result, the insurance industry fears that a manufacturer might purchase huge limits every third or fourth year and self-insure during intervening periods.[126]

By allowing the manufacturer to pick and choose which policy limits will apply to which claim of injury, the *Keene* court clearly went beyond any reasonable expectations either the insurer or the manufacturer could have had.

A better solution would be to adopt a *Keene*-type of liability where coverage is triggered by exposure, exposure in residence, and manifestation. Then, the liability of each insurer would be prorated by the following formula: the number of years of coverage during the period from the plaintiff's first exposure to the manufacturer's product until the manifestation of the disease, divided by the total number of years of this same period. Each insurer would be liable for its prorata share of the judgment to the extent of its policy limits. The manufacturer would be liable for any portion not covered by insurance, whether that results from uninsured periods of time or low policy limits.

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[125]*See generally* Note, *The Causation Problem in Asbestos Litigation: Is There an Alternative Theory of Liability?*, 15 IND. L. REV. 679 (1982).

[126]Rundle, Keene *Jackpot: $300 Million in Coverage*, Business Insurance, Oct. 26, 1981, at 47, col. 5.

This proposed solution can be justified by society's recognition of the institution of insurance as a method of spreading risk of loss.[127] By holding all insurers on the risk during any stage of the development of the disease liable for a prorata share of the injury, the cost is spread across more of the insurance industry. However, the manufacturer must be responsible for uninsured periods because insurance coverage cannot be extended beyond the terms of the contract to cover periods of time for which no insurance was purchased. Although this proposed solution may not give each individual manufacturer as much coverage as under another rule, it would maximize coverage and give manufacturers, insurers, and the courts the consistency needed to deal with a nationwide problem.

V. CONCLUSION

The manifestation-exposure dispute has also arisen with respect to insurance coverage for other latent diseases. The most notable to date has risen in cases involving cancer allegedly caused by the drug diethylstilbestrol (DES).[128] There is also some evidence that hundreds of chemicals used in the workplace today may be carcinogenic.[129] Because most cancers develop slowly, the exposure-manifestation issue will undoubtedly surface with respect to other potential carcinogens. The law currently being developed in asbestos litigation will be the logical place to look for guidance in these future cases. The need for consistency and predictability in the determination of manufacturers' and insurers' respective liability in all latent disease cases makes the coverage issue in asbestos litigation extremely important and deserving of great scrutiny.

MARY K. REEDER

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[127] 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1:3 (2d ed. 1959).

[128] *See, e.g.*, American Motorists Ins. Co. v. E.R. Squibb & Sons, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (1978).

[129] Tomatis, Agthe, Bartsch, Huff, Monksano, Saracci, Walker & Wilbourn, *Evaluation of the Carcinogenicity of Chemicals: A Review of the Monograph Program of the International Agency for Research on Cancer (1971 to 1977)*, 38 CANCER RESEARCH 877, 882-83 (1978). Some examples of carcinogens present in the work place are asbestos, coke oven emissions, vinyl chloride, chloromethyl methyl ether (CMME) and bischloromethyl ether (BCME). Henderson, *Product Liability Disease Litigation: Blueprint for Occupational Safety and Health*, TRIAL, Apr. 1980, at 25, 26.

Determining the Constitutionality of the Bankruptcy Code "Opt-Out" Provision: A Critical Look at *In re Sullivan*

I. INTRODUCTION

Although every federal bankruptcy law has allowed exemptions of some kind to bankrupt debtors,[1] the Bankruptcy Reform Act of 1978 (the Code)[2] represents a substantial departure from previous bankruptcy legislation regarding exemptions.[3] The Code's exemption section[4] allows a debtor to choose between the specific exemptions provided in the Code[5] and the exemptions allowed under state, local, and nonbankruptcy federal law,[6] but the Code makes this choice sub-

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[1]In general, exempted property is that property which the law allows a debtor to retain free from the claims of creditors. *See* 31 AM. JUR. 2d *Exemptions* § 1 (1967).

[2]Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (Supp. IV 1980). The Code became effective on October 1, 1979. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(a), 92 Stat. 2549, 2682.

[3]The four bankruptcy laws which preceded the Code are the Bankruptcy Act of 1898, ch. 451, 30 Stat. 544 (previously codified at 11 U.S.C. §§ 1-1255 (1976) (repealed 1978)); the Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1879); the Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); and the Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[4]11 U.S.C. § 522 (Supp. IV 1980). Section 522 provides in pertinent part:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—
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> (1) property that is specified under subsection (d) of this section, *unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize*; or, in the alternative,
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> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than at any other place; and
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> (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law.

Id. (emphasis added). Section 541, referred to in subsection 522(b), lists the property of the debtor which is included in the estate placed in the control of the bankruptcy trustee. *Id.* § 541.

[5]The exemptions in subsection 522(d) are based on those provided in the Uniform Exemptions Act (U.E.A.), promulgated by the National Conference of Commissioners on Uniform State Laws. H.R. REP. NO. 595, 95th Cong., 1st Sess. 361, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 6317 [hereinafter cited as HOUSE REPORT].

[6]11 U.S.C. § 522(b)(2)(A) (Supp. IV 1980). *See* note 4 *supra*. Examples of nonbankruptcy federal exemptions include: Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. § 916 (1976); special pensions paid to

ject to one very important prohibition. Under the so-called "opt-out" provision of the Code,[7] a state may deny to its domiciliaries the specific federal exemptions provided in the Code. Therefore, a debtor domiciled in a state which has opted out is limited in a federal bankruptcy proceeding to the exemptions allowed under state, local, and nonbankruptcy federal law.[8]

The opt-out provision of the Code raises two serious constitutional issues. The first issue raised is whether the Code satisfies the constitutional requirement that federal bankruptcy legislation must be "uniform . . . throughout the United States."[9] Because the opt-out provision allows each state to decide that only the various and diverse state exemptions will be available to its domiciliaries in

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winners of the Congressional Medal of Honor, 38 U.S.C. § 3101(a) (1976); social security payments, 42 U.S.C. § 407 (1976); injury or death compensation payments from war risk hazards, 42 U.S.C. § 1717 (1976); federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. § 175 (1976); Railroad Retirement Act annuities and pensions, 45 U.S.C. § 231m (1976); veterans benefits, 45 U.S.C. § 352(e) (1976); wages of fishermen, seamen, and apprentices, 46 U.S.C. § 601 (1976). *See* HOUSE REPORT, *supra* note 5, at 360.

[7]11 U.S.C. § 522(b)(1) (Supp. IV 1980). *See* note 4 *supra*.

[8]To date, thirty-two states have taken this step. *See* ALA. CODE § 6-10-11 (Supp. 1981); ARIZ. REV. STAT. ANN. § 33-1133 (Supp. 1982); ARK. STAT. ANN. § 36-210 (Supp. 1981); COLO. REV. STAT. § 13-54-107 (Supp. 1981); DEL. CODE ANN. tit. 10, § 4914 (Supp. 1981); FLA. STAT. ANN. § 222.20 (West Supp. 1981); GA. CODE ANN. § 51-1601 (Supp. 1981); IDAHO CODE § 11-609 (Supp. 1981); ILL. ANN. STAT. ch. 52, § 101 (Smith-Hurd Supp. 1981); IND. CODE § 34-2-28-0.5 (Supp. 1981); IOWA CODE § 627.10 (Supp. 1982); KAN. STAT. ANN. § 60-2312 (Supp. 1981); KY. REV. STAT. § 427.170 (Supp. 1980); LA. REV. STAT. ANN. § 13:3881(B) (West Supp. 1981); Act of June 5, 1981, ch. 431, § 2, 1981 Me. Legis. Serv. No. 3 at 886 (to be codified at ME. REV. STAT. ANN. tit. 7, § 4421); MD. CTS. & JUD. PROC. CODE ANN. § 11-504(g) (Supp. 1981); H.B. 495, 1981 Mont. Laws (effective Oct. 1, 1981); NEB. REV. STAT. § 25-15, 105 (Supp. 1980); NEV. REV. STAT. § 21.090(3) (1982); N.H. REV. STAT. ANN. § 511:2-a (Supp. 1981); Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 20 (to be codified at N.C. GEN. STAT. § IC 1601(f)); N.D. CENT. CODE § 28-22-17 (Supp. 1981); OHIO REV. CODE ANN. § 2329.662 (Page 1981) (repealed effective Sept. 28, 1983, unless reenacted by subsequent legislation); OKLA. STAT. ANN. tit. 31, § 1(B) (West Supp. 1981); OR. REV. STAT. § 23.305 (1981); S.C. CODE § 15-41-425 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 43-45-13 (Supp. 1981); TENN. CODE ANN. § 26-2-112 (1980); UTAH CODE ANN. § 78-23-15 (Supp. 1981); VA. CODE § 34-3.1 (Supp. 1981); W. VA. CODE § 38-10-4 (Supp. 1981); WYO. STAT. § 1-20-109 (Supp. 1981). In addition, California has used its opt-out authority to restrict a husband and wife to the same exemption provisions (either state or federal) in a joint case. CAL. CIV. PROC. CODE § 690(b) (West Supp. 1981).

Illinois and Tennessee have had their opt-out statutes invalidated because they conflict with section 522 of the Code and therefore are void under the supremacy clause of the Constitution. Bradshaw v. Beneficial Fin. Co. (*In re* Balgemann), 16 Bankr. 780 (Bankr. N.D. Ill. 1982); Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981). These cases are discussed in the text accompanying notes 166-72 *infra*.

[9]U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *Id.*

bankruptcy, the Code's satisfaction of the uniformity requirement has been challenged in numerous bankruptcy and district court cases.[10] The second issue raised by the opt-out provision is the question of unlawful delegation. The Constitution prohibits Congress from delegating to the states its essential legislative functions.[11] Because the opt-out provision specifically authorizes the states to decide whether to prohibit the federal exemptions, the opt-out provision has been attacked as an unlawful delegation by Congress of its power to enact bankruptcy laws.[12]

In *In re Sullivan*,[13] decided May 19, 1982, the Court of Appeals for the Seventh Circuit became the first appellate court to address these two constitutional issues. In *Sullivan*, the appellate court considered two consolidated appeals.[14] In both cases, the debtors had attempted to claim the specific exemptions provided in the Code.[15] The trustees objected because the Illinois opt-out statute[16] restricted the debtors to the exemptions provided by Illinois law.[17] The bankruptcy judges sustained the trustees' objections, and the debtors appealed. On appeal, the debtors argued that the opt-out provision violates the uniformity requirement of the bankruptcy clause of the Constitution and constitutes an unlawful delegation by Congress of its bankruptcy power to the states.[18] The appellate court rejected both arguments and affirmed the lower courts' decisions.[19]

This Note criticizes the *Sullivan* court's reliance on the Supreme

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[10]*See, e.g.*, Kosto v. Lausch (*In re* Lausch), 16 Bankr. 162 (M.D. Fla. 1981); *In re* Vasko, 6 Bankr. 317 (Bankr. N.D. Ohio 1980).

[11]The Supreme Court has determined that two constitutional provisions, taken together, require this prohibition. Article I, section 1 of the United States Constitution provides that, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." Article I, section 8, clause 18 of the United States Constitution states that Congress is authorized "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its general powers. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1934).

[12]*See, e.g.*, Kosto v. Lausch (*In re* Lausch), 16 Bankr. 162 (M.D. Fla. 1981); Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981).

[13]680 F.2d 1131 (7th Cir. 1982).

[14]The decision of the Bankruptcy Court for the Central District of Illinois in *In re* Sullivan, 11 Bankr. 432 (Bankr. C.D. Ill. 1981), was appealed directly to the court of appeals under an agreement with the United States pursuant to 28 U.S.C. § 1293(b). 680 F.2d at 1132. The other case, *In re* West, No. 81-1084 (C.D. Ill. 1981), was appealed from the District Court for the Central District of Illinois, which had affirmed, without opinion, the decision of the bankruptcy court. 680 F.2d at 1132.

[15]*See* 680 F.2d at 1132.

[16]ILL. ANN. STAT. ch. 52, § 101 (Smith-Hurd 1981).

[17]680 F.2d at 1132.

[18]*Id.* at 1131-32.

[19]*Id.* at 1138.

Court's decision in *Hanover National Bank v. Moyses*[20] to find that the Code meets the constitutional requirement of uniformity. In *Sullivan*, the court interpreted *Moyses* as adopting the nondiscrimination test of uniformity which was enunciated in earlier Supreme Court cases construing the revenue clause of the Constitution.[21] This Note argues that *Moyses* did not adopt the nondiscrimination test of uniformity, but adopted a uniformity test requiring equality of exemptions in and out of bankruptcy. Further, this Note argues that although the opt-out provision of the Code satisfies the nondiscrimination test of uniformity, it does not satisfy the test requiring equality of exemptions in and out of bankruptcy. Therefore, if *Moyses* is controlling as to the issue of the Code's uniformity, then the opt-out provision must be held unconstitutional.

This Note also criticizes the *Sullivan* court's resolution of the unlawful delegation issue. This Note argues that the unlawful delegation issue should be resolved by the application of a two-step analysis. The courts must determine first whether a delegation exists. If so, the courts must then determine whether the delegation is lawful. When this two-step analysis is applied to the opt-out provision, this Note concludes that the opt-out provision should be construed as a lawful delegation of bankruptcy power by Congress to the states.

Finally, this Note briefly discusses the consequences of the delegation issue for the constitutionality of state exemption laws under the supremacy clause.

II. BACKGROUND

A full understanding of the opt-out provision and the attendant constitutional questions it raises necessitates an examination of the history of the Code and the policy considerations which prompted its enactment.

The Code's predecessor, the Bankruptcy Act of 1898,[22] allowed debtors in bankruptcy proceedings the exemptions prescribed by the laws of their domiciliary states.[23] By allowing the debtor to claim

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[20]186 U.S. 181 (1902).

[21]*See* notes 42-57 *infra* and accompanying text.

[22]Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[23]Section 6 of the 1898 Act provided:

> This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months in any other State.

Id. § 6, *as amended by* Chandler Act, ch. 575, § 6, 52 Stat. 840, 847 (1938).

exemptions and by discharging the debtor from his financial obligations, the 1898 Act sought to grant the debtor an economic fresh start.[24] In the years following the enactment of the 1898 Act, the United States changed from a predominately rural to a more urban society. Many states' exemption statutes, however, failed to change with the times. As a result, the efficacy of the generally static state exemptions to provide a realistic economic fresh start, particularly to urban dwellers, dwindled.[25] In addition, there were vast differences among the states' exemption statutes. While some states provided very generous exemptions to their domiciliaries, other states allowed debtors only a meager allowance with which to begin anew.[26] By 1960, legal commentators were advocating reform; some favored the revision of state exemption statutes,[27] and others supported the enactment of exclusive federal exemptions.[28]

In response to these criticisms, Congress formed the Commission on the Bankrupty Laws of the United States in 1970.[29] The Commission filed a report of its findings with Congress on July 30, 1973,[30] along with a draft of its proposed new federal bankruptcy act.[31] As introduced in the House, the proposed act provided a set of exclusive federal exemptions and eliminated the use of state exemptions in bankruptcy proceedings.[32]

The National Conference of Bankruptcy Judges, however, was opposed to the use of exclusive federal exemptions and decided to draft its own reform legislation. The so-called Judges' Bill[33] gave bankrupts a choice between the list of federal exemptions set out in

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[24]*See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549, 554-55 (1915); Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

[25]For example, one well-known bankruptcy authority noted that, as late as 1976, Connecticut's exemption law provided debtors with only a meager set of exemptions including "two cords of wood, two tons of hay, five bushels each of potatoes and turnips, [and] ten bushels each of Indian corn and rye." The statute had not been changed since 1821. Countryman, *Consumers in Bankruptcy Cases*, 18 WASHBURN L.J. 1, 2 (1978) (citing CONN. GEN. STAT. ANN. § 52-352 (West 1976)).

[26]Western states typically were much more generous to debtors in granting exemptions than were eastern states. *See generally* Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1468-69 (1959).

[27]*See, e.g.*, Kennedy, *Limitations of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445 (1959).

[28]*See, e.g.*, Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUT. L. REV. 678 (1960); Note, *supra* note 26.

[29]Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

[30]REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. I (1973).

[31]*Id.*, pt. II.

[32]H.R. 10792, 93d Cong., 1st Sess. § 4-503 (1973).

[33]H.R. 32, 94th Cong., 1st Sess. (1975).

the Commission's bill, and those exemptions provided under state, local, and nonbankruptcy federal law.[34]

The alternate-exemptions scheme of the Judges' Bill ultimately was adopted by the House of Representatives in section 522 of the House's version of the bankruptcy reform bill.[35] In the final draft of the Senate reform bill, however, the Senate retained the 1898 Act's reference to state law and rejected the Commission's recommendations and the compromise position of the Judges' and House bills.[36] As the result of a hurried compromise between the House and Senate, the final enacted version of the Code retained the House's alternate-exemptions scheme, but allowed the states to opt out of the federal exemptions.[37] Because little or no legislative history exists to illuminate Congress intent in enacting the opt-out provision,[38] the difficulty of determining the constitutionality of the provision is exacerbated.

III. THE UNIFORMITY ISSUE

Three constitutional provisions contain a uniformity requirement: the bankruptcy clause,[39] the naturalization clause,[40] and the revenue clause.[41] The term "uniform," as it is used in the Constitution, has been interpreted to require something less than intrinsic or absolute uniformity under the bankruptcy and revenue clauses. The Supreme Court first addressed the uniformity requirement in tax cases construing the revenue clause.[42]

Representative of these tax cases is *Knowlton v. Moore*.[43] In *Knowlton*, the executors of a will alleged that because the then current revenue act taxed different legacies at different rates based on the amount of the legacy, the act violated the uniformity requirement of the revenue clause.[44] The revenue clause provides that, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."[45]

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[34]*Id.* § 4-503.

[35]H.R. 8200, 95th Cong., 2d Sess. § 522 (1977).

[36]S. 2266, 95th Cong., 2d Sess. § 522 (1977).

[37]124 CONG. REC. 32,398 (1978) (remarks of Rep. Edwards).

[38]*See In re* Sullivan, 680 F.2d 1131, 1136 (7th Cir. 1982).

[39]U.S. CONST. art. I, § 8, cl. 4.

[40]*Id.*

[41]*Id.*, cl. 1.

[42]*See, e.g.*, Fairbank v. United States, 181 U.S. 283 (1901); Knowlton v. Moore, 178 U.S. 41 (1900); Head Money Cases, 112 U.S. 580 (1884).

[43]178 U.S. 41 (1900).

[44]*Id.* at 83-84.

[45]U.S. CONST. art. I, § 8, cl. 1.

The executors argued that the uniformity requirement commanded an intrinsic uniformity which required that excises, duties, and imposts must operate equally upon all persons and property.[46] In rejecting this argument, the Court relied on the debates over the revenue clause at the Constitutional Convention. The Court concluded that the drafters' sole intent in imposing a uniformity requirement on congressional revenue power was to prevent the possible discrimination by Congress against one or more states.[47] The Court, referring to such uniformity as "geographical uniformity,"[48] found that the revenue act satisfied the uniformity requirement.[49] Therefore, the Supreme Court adopted a nondiscrimination test of uniformity under the revenue clause, such that Congress was prohibited from discriminating among the states in enacting revenue laws.[50]

In 1902, just two years after deciding *Knowlton*, the Supreme Court first addressed the uniformity required by the bankruptcy clause. In the landmark case of *Hanover National Bank v. Moyses*,[51] the Court stated, in dicta, that the uniformity required under the bankruptcy clause was "geographical and not personal."[52]

Because the Court in *Moyses* referred to the uniformity required by the bankruptcy clause as geographical, the *Sullivan* court interpreted *Moyses* as adopting the same nondiscrimination test of geographical uniformity developed in *Knowlton* and the other early tax cases. The *Sullivan* court referred to "the" concept of geographical uniformity,[53] and cited *Moyses* and the tax cases together in support of the geographical interpretation.[54] It appears that the debtors in *Sullivan* also believed that *Moyses* adopted the nondiscrimination test of geographical uniformity because the debtors argued that *Moyses* was either incorrectly decided or not applicable to the Code.[55] Although the *Sullivan* court stated that, "[a]rguably the uniformity provision relating to bankruptcies had a different focus" than the uniformity provision of the revenue clause,[56] the court claimed that no support could be found for this distinction in the *Moyses* decision or in later Supreme Court cases.[57]

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[46]178 U.S. at 84.
[47]*Id.* at 89.
[48]*Id.* at 106.
[49]*Id.* at 107-09.
[50]*Id.* at 89.
[51]186 U.S. 181 (1902).
[52]*Id.* at 188.
[53]680 F.2d at 1133-34.
[54]*Id.* at 1133.
[55]*Id.* at 1134.
[56]*Id.*
[57]*Id.* at 1134-35.

The *Sullivan* court's analysis is subject to attack on two grounds. First, the term "uniform" need not be given the same meaning under both the revenue and bankruptcy clauses. As pointed out in *Sullivan*, the uniformity requirement under the naturalization clause has not been interpreted as demanding only geographical uniformity.[58] Second, a strong argument can be made that *Moyses* developed a different test of geographical uniformity for the bankruptcy clause than the nondiscrimination test of the tax cases. A proper analysis of the *Moyses* decision and the cases on which it relied supports this argument.

The bankruptcy laws of 1800[59] and 1841[60] did not allow debtors in bankruptcy proceedings to claim state exemptions.[61] The first act allowing state exemptions was enacted in 1867. The 1867 Act allowed debtors to claim the state exemptions only as they existed in 1864, and permitted their application only if the state exemptions exceeded the $500 upper limit imposed by the act.[62]

The use of state exemption laws in the 1867 Act prompted arguments for the first time that the recognition of state exemptions by the federal bankruptcy law would violate the constitutional uniformity requirement. Although several lower court decisions upheld the constitutionality of the 1867 Act on this issue,[63] the Supreme Court did not address the problem until it decided *Moyses* in 1902.[64] In *Moyses*, the Court construed the 1898 Act which allowed debtors to claim only the exemptions provided by their domiciliary states.[65]

In *Moyses*, the creditor bank had brought suit on a judgment against Moyses for nonpayment of his promissory note. The bank, unable to collect on the judgment because of Moyses's discharge in

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[58]*Id.* at 1135. *See also* Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1013-17 (1976) (arguing that the naturalization clause requires more than geographical uniformity).

[59]Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[60]Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843).

[61]Under the Bankruptcy Act of 1800, debtors in bankruptcy proceedings were not allowed exemptions under state exemption statutes. Rather, the act stipulated what exemptions the debtor was allowed, permitting the debtor to retain certain specified property, such as clothing and household necessities. Bankruptcy Act of 1800, ch. 19, § 5, 2 Stat. 19, 23 (repealed 1803). In addition, the debtor could retain a portion of his other assets, such portion determined as a percentage of the total assets available to creditors. *Id.* § 34. The Bankruptcy Act of 1841 provided a similar exemption subject, however, to a flat $300 maximum limit. Bankruptcy Act of 1841, ch. 9, § 3, 5 Stat. 440, 442 (repealed 1843).

[62]Bankruptcy Act of 1867, ch. 176, § 14, 14 Stat. 517, 522-23 (repealed 1879).

[63]*E.g.*, Darling v. Berry, 13 F. 659 (C.C.D. Iowa 1882); *In re* Beckerford, 3 F. Cas. 26 (C.C.D. Mo. 1870) (No. 1,209).

[64]186 U.S. 181 (1902).

[65]*See* note 23 *supra*.

bankruptcy, argued that the 1898 Act was unconstitutional. The bank alleged, *inter alia*, that because the 1898 Act gave debtors in bankruptcy proceedings the exemptions provided by the various laws of their domiciliary states, the 1898 Act did not establish a uniform bankruptcy law and therefore was void.[66] The Supreme Court rejected the bank's arguments and held the 1898 Act to be constitutional.[67]

Although the Court stated, in dicta, that the 1898 Act satisfied the geographical uniformity required by the Constitution,[68] the Court *specifically held* that:

> [T]he system is, in the constitutional sense, uniform throughout the United States, *when the trustee* [in bankruptcy] *takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed.* The general operation of the law is uniform although it may result in certain particulars differently in different States.[69]

The *Moyses* test states, in effect, that the uniformity requirement is satisfied if creditors, through the bankruptcy trustee, take pro rata in bankruptcy the same amount of property that they could have taken to satisfy their claims in state court proceedings by means of judicial process. In other words, to be uniform the bankruptcy act must grant the same exemptions to debtors in bankruptcy that are available to debtors outside of bankruptcy.

As noted by the *Sullivan* court, the Supreme Court based its holding in *Moyses* on two earlier federal circuit court decisions, *In re Beckerford*[70] and *In re Deckert*.[71] In *Beckerford*, the court found support for the uniformity of the 1867 Act on two grounds. First, the law was uniform with respect to the distribution of the debtor's assets because the law distributed equally among creditors that property which was not exempt.[72] Second, the amount of assets available to creditors in and out of bankruptcy was uniform because the existing state exemptions also were the exemptions in bankruptcy.[73]

In *Deckert*, Chief Justice Waite, sitting as Circuit Justice, reiterated the position taken in *Beckerford* to justify the 1867 Act's uniformity. He stated that because "every debt is contracted with

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[66]186 U.S. at 183.
[67]*Id.* at 190.
[68]*Id.* at 188.
[69]*Id.* at 190 (emphasis added).
[70]3 F. Cas. 26 (C.C.D. Mo. 1870) (No. 1,209).
[71]7 F. Cas. 334 (C.C.E.D. Va. 1874) (No. 3,728).
[72]3 F. Cas. at 27.
[73]*Id.*

reference to the rights of the parties thereto under existing exemption laws, . . . no [bankruptcy] creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of [judgment] creditors."[74] Therefore, the courts in both *Beckerford* and *Deckert* upheld the uniformity of the 1867 Act because creditors were able to obtain the same amount of property in bankruptcy that they could obtain outside of bankruptcy under state law. In other words, they upheld the uniformity of the 1867 Act because the exemptions were the same both in and out of bankruptcy. This is precisely the rationale which was followed by the Supreme Court in *Moyses*.

It could be argued that the Court in *Moyses* did not intend equality of exemptions in and out of bankruptcy to be an exclusive test of uniformity, but merely one example of uniform operation. However, the Court's reliance on *Deckert* and *Beckerford* disputes this argument. In *Deckert*, the court noted that the uniformity of the 1867 Act was sustained because it "subject[ed] to the payment of debts under its operation *only* such property as could [be reached] by judicial process . . . ."[75] The court in *Deckert* also stated that it was proper to confine the 1867 Act's operation to such property.[76] Therefore, these earlier cases, which the Court in *Moyses* solely relied upon, determined that the uniformity requirement under the bankruptcy clause was one of equality and fairness in its "operations"[77] upon debtors and creditors.[78] As the *Sullivan* court noted,[79] the Court in *Moyses* relied exclusively on *Beckerford* and *Deckert*. Although it had decided *Knowlton* just two years earlier, the Supreme Court did not cite *Knowlton* for the geographical uniformity established in *Moyses*.[80] This implies that the Court in *Moyses* intended to adopt the uniformity interpretation set out in *Beckerford* and *Deckert*, rather than follow the nondiscrimination test of uniformity enunciated by the Supreme Court in *Knowlton*.

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[74]7 F. Cas. at 336. *Deckert* involved the 1873 amendment to the 1867 act, 17 Statutes at Large 577, which set bankruptcy exemptions equal to state exemptions as they existed in 1871. Because bankruptcy exemptions did not, as a result, follow existing state laws, the court found the amendment unconstitutional. 7 F. Cas. at 336. *But see In re* Smith, 22 F. Cas. 413, 414 (C.C.N.D. Ga. 1876) (No. 12,996). That the original act of 1867 set exemptions as they existed in 1864, 14 Statutes at Large 523, seems to have been overlooked in both *Beckerford* and *Deckert*.

[75]7 F. Cas. at 336 (emphasis added).

[76]*Id.*

[77]"A bankrupt law, therefore, to be constitutional . . . must be *uniform in its operations*, not only within a state, but within and among all the states." *Deckert*, 7 F. Cas. at 335 (emphasis added).

[78]*See* Countryman, *supra* note 28, at 681.

[79]680 F.2d at 1134.

[80]186 U.S. at 188.

Prior to *Knowlton*, a lower court applied a nondiscrimination test to determine the uniformity of bankruptcy exemptions in *Darling v. Berry*.[81] In addition, the *Darling* court pointed out that the test of uniformity developed in *Beckerford* and *Deckert* was a different test than the nondiscrimination test, which was later adopted in *Knowlton*.[82] In *Darling*, the court severely criticized Justice Waite's view of the bankruptcy uniformity requirement as expressed in *Deckert* and later adopted in *Moyses*. The *Darling* court stated that courts which had "treat[ed] the question as depending rather upon the *operation* or working of the law, than upon its *application* according to its own terms to the various states of the Union" had "applied to it an erroneous test of uniformity."[83] The court then refined its reference to the law's *application* to the various states. "[W]hen a bankrupt, revenue, or naturalization law is made *by its terms applicable alike to all the states of the Union, without distinction or discrimination*, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the [C]onstitution . . . ."[84]

Although the *Darling* court conceded that the use of existing state exemptions in bankruptcy was fair and just, it admonished that justice and the constitutional requirement of uniformity should not be confused.[85] In criticizing the *Deckert* court's uniformity test of fairness of operation, the *Darling* court stated that, "All that the [C]onstitution intends is that [C]ongress shall not pass partial revenue and bankruptcy laws. *It shall not prescribe one law for this state or section, and a different law for that state or section.*"[86]

Although *Darling* was effectively overruled by *Moyses*, *Darling* clearly shows that the interpretation of the bankruptcy uniformity requirement in *Beckerford*, *Deckert*, and *Moyses* differs from the interpretation of the revenue uniformity requirement in the tax cases. The Court in *Moyses* must have been aware of its decision in *Knowlton* just two years earlier, yet the Court relied on the older *Beckerford* and *Deckert* circuit court decisions. Therefore, even though the Court in *Moyses* stated in dicta that the uniformity required by the bankruptcy clause was geographical, the test the Court adopted in *Moyses* is not the same geographical uniformity test enunciated in the tax cases. Rather, the *Moyses* test is one of

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[81]13 F. 659 (C.C.D. Iowa 1882).

[82]*See* text accompanying notes 43-50 *supra*.

[83]13 F. at 667 (emphasis added).

[84]*Id.* (emphasis added). For a comment on the court's inclusion of naturalization law in this statement see Hertz, *supra* note 58, at 1014. The court later left out any reference to naturalization law in a similar statement. *See* text accompanying note 86 *infra*.

[85]13 F. at 668.

[86]*Id.* at 667 (emphasis added).

fairness of operation of the bankruptcy act on the creditors and debtors of each state. The test requires that creditors be able to obtain the same amount of assets in bankruptcy as they can out of bankruptcy.

Although this Note has shown that the *Moyses* test of bankruptcy uniformity differs from the nondiscrimination test enunciated in *Knowlton*, this distinction is insignificant if the opt-out provision is constitutional under either test. It is apparent that the opt-out provision satisfies the nondiscrimination test of uniformity. The Code initially provides specific federal exemptions to the debtors of each state. In addition, the Code permits any state to opt out of the federal exemptions. The Code, by its terms, is applicable alike to all the states without discrimination and therefore is uniform under the nondiscrimination test of geographical uniformity.

The opt-out provision, however, is not constitutional under the *Moyses* test. The *Moyses* test of uniformity requires that creditors, through the bankruptcy trustee, take pro rata in bankruptcy the same amount of property that they could have taken to satisfy their claims in state court by means of judicial process. Stated another way, under the *Moyses* test a bankruptcy law is uniform with regard to exemptions only if debtors obtain the same exemptions in and out of bankruptcy.[87]

The problems with a general uniformity test based on equality of exemptions in and out of bankruptcy are readily apparent. If Congress had followed the Commission's recommendation and had enacted a bankruptcy law which provided only an exclusive federal list of exemptions, the *Moyses* test would not be satisfied. Even though bankruptcy exemptions would be the same throughout the United States, those exemptions would necessarily differ from the exemptions under the various states' laws. Similarly, the *Moyses* test is not met when debtors in states which have not opted out of the federal exemptions choose the exemptions in subsection 522(d) instead of state and nonbankruptcy federal exemptions. This failure to conform to *Moyses* results even though the exemptions claimed by the debtors in those different states are more uniform, in terms of being identical, than the supposedly uniform exemptions the debtors would have claimed under the 1898 Act. One possible answer to this dilemma is that the *Moyses* test is not a general test of uniformity, but is to be applied only in the specific instance when state exemption laws are given effect in bankruptcy.

The 1898 Act clearly satisfied this limited interpretation of the *Moyses* test. Because the 1898 Act adopted the existing state exemptions as those which would be recognized in bankruptcy, exemptions

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[87]*See* text accompanying note 69 *supra*.

were the same both in and out of bankruptcy. However, exemption legislation enacted in several states under the opt-out provision of the Code raises the question of whether the Code satisfies even this narrow interpretation of *Moyses*. Ohio's exemption law is representative of such legislation.

Ohio, exercising its power under subsection 522(b)(1), opted out of the federal exemption plan and denied the list of exemptions in subsection 522(d) to its domiciliaries.[88] Ohio also revised its list of exemptions, generally increasing the amount of property debtors can exempt and updating its law as to the types of property exempted.[89] In this respect, Ohio has done basically what other opt-out states have done.[90] However, Ohio's exemption legislation was unprecedented in declaring that two particular exemptions are available to debtors *only* in bankruptcy proceedings.[91] As a result, in Ohio a bankruptcy trustee will get less property for distribution to creditors than creditors will obtain by judicial process in state courts. *Moyses* expressly prohibits this result when state exemption laws are used in bankruptcy proceedings.

An Ohio bankruptcy trustee raised precisely this point in *In re*

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[88]OHIO REV. CODE ANN. § 2329.662 (Page 1981). The Ohio statute provides: "Pursuant to the 'Bankruptcy Reform Act of 1978,' 92 Stat. 2549, 11 U.S.C. 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified in . . . [Code section] 522(d)." OHIO REV. CODE ANN. § 2329.662 (Page 1981) (repealed effective Sept. 28, 1983, unless reenacted by subsequent legislation).

[89]OHIO REV. CODE ANN. § 2329.66 (Page 1981). For a thorough examination and analysis of the Ohio exemption statute see Fisher, *The Federal Exemption Scheme: Delayed Until 1983 For Ohio Bankrupts*, 49 U. CIN. L. REV. 791 (1980). See also Note, *Ohio Opts Out of the Federal Bankruptcy Exemptions and Revises Its Exemption Laws*, 5 U. DAYTON L. REV. 461 (1980).

[90]*See generally* ARIZ. REV. STAT. ANN. § 33-1133 (Supp. 1981); IND. CODE § 34-2-28-1 (Supp. 1981); NEB. REV. STAT. § 25-15, 105 (Supp. 1981).

[91]OHIO REV. CODE ANN. § 2329.66(A)(4)(a), .66(A)(17) (Page 1981). The statute provides, in pertinent part, as follows:

> 2329.66 Exempted interests and rights.
>
> (A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:
>
> . . . .
>
> (4)(a) The person's interest, not to exceed four hundred dollars, in cash on hand, money due and payable, money to become due within ninety days, tax refunds, and money on deposit with a bank, building and loan association, savings and loan association, credit union, public utility, landlord, or other person. *This division applies only in bankruptcy proceedings.*
>
> . . . .
>
> (17) The person's interest, not to exceed four hundred dollars, in any property, except that *this division applies only in bankruptcy proceedings.*

Id. (emphasis added).

Vasko.[92] Although the *Vasko* court cited an earlier Ohio case which had addressed the uniformity requirement,[93] the court refused to address the issue raised by the trustee. Because the trustee attacked the validity of the *state's* exemption law, rather than challenging the constitutionality of the Code itself, the *Vasko* court was spared the difficult task of resolving this obvious conflict.[94] The court recognized that the uniformity requirement is "only controlling as to the congressional exercise of power."[95]

Eventually the Code will be challenged as violating the *Moyses* test because the opt-out provision allows state exemption statutes like the one in Ohio. Posited in this context, the uniformity issue would be properly raised. When this challenge arises, a proper application of *Moyses* demands that the opt-out provision be found unconstitutional. Notwithstanding the arguments raised in *Darling* against the test of uniformity later adopted in *Moyses*, a lower court "obviously lacks the authority to overrule a Supreme Court case."[96] If the opt-out provision is to be found constitutional, the Supreme Court must resolve the uniformity issue by reassessing its decision in *Moyses*.

IV. THE UNLAWFUL DELEGATION ISSUE

A. The Sullivan *Court's Resolution of the Unlawful Delegation Issue*

In addition to arguing that the opt-out provision violates the bankruptcy uniformity requirement, the debtors in *Sullivan* argued that the opt-out provision constitutes an unlawful delegation by Congress of its power to enact bankruptcy laws.[97] The court in *Sullivan* rejected this argument on three grounds. First, the court found that the exemptions in section 522 of the Code have not preempted state exemptions.[98] Second, the court determined that the opt-out provision is not a delegation of congressional authority because the states have concurrent power to enact bankruptcy laws.[99] Third, the court relied on *Moyses* to support its finding that no unlawful delegation exists under the Code.[100]

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[92]6 Bankr. 317 (Bankr. N.D. Ohio 1980).
[93]*Id.* at 319 (citing *In re* Hill, 4 Bankr. 310 (Bankr. N.D. Ohio 1980)).
[94]*See* 6 Bankr. at 318.
[95]*Id.* at 320.
[96]*In re* Sullivan, 680 F.2d 1131, 1134 (7th Cir. 1982).
[97]*Id.* at 1132.
[98]*Id.* at 1136-37.
[99]*Id.* at 1137.
[100]*Id.*

In rejecting the reasoning of two cases on which the debtors relied, *In re Rhodes*[101] and *Cheeseman v. Nachman*,[102] the *Sullivan* court addressed only the preemption analysis raised in these cases. In both *Rhodes* and *Cheeseman*, the courts had found that by enacting the specific federal bankruptcy exemptions in the Code, Congress had preempted state law on the subject of exemptions.[103] Both courts had found a fresh start policy in the section 522 exemption scheme; therefore, if state law exemptions conflicted with this fresh start policy, the state exemption scheme was void.[104]

The *Sullivan* court refused to apply this preemption analysis to the opt-out provision. Because of the compromise between the House and Senate which resulted in the opt-out provision of the Code, the *Sullivan* court found that the fresh start policy of the exemption provision could be attributed only to the House version, and not to the final enacted version of the Code.[105]

The court in *Sullivan* also stated that a preemption analysis is not applicable where the states are specifically permitted by Congress to opt out of the federal exemptions.[106] The *Rhodes* court determined that because the exemptions in the Code had preempted the state exemptions, the opt-out provision was a delegation by Congress of its bankruptcy power to the states.[107] That delegation was lawful, however, because the federal exemption scheme in section 522 set limits on the states' bankruptcy power.[108] "[T]he delegation of authority to the states to 'opt-out' has been carefully circumscribed and the states may exercise that authority only if they provide their citizens with a scheme of bankruptcy exemptions that is not inconsistent with the provisions of § 522."[109] However, the *Sullivan* court failed to address the delegation finding in *Rhodes*. Instead, the *Sullivan* court determined that there was no delegation because the states have concurrent bankruptcy power.

The court in *Sullivan* stated that the debtors had "overlook[ed] the long-established principle that the states retain the power to enact bankruptcy laws so long as they do not conflict with federal bankruptcy legislation."[110] To support this statement, the *Sullivan*

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[101]Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981).
[102]656 F.2d 60 (4th Cir. 1981).
[103]14 Bankr. at 631; 656 F.2d at 63.
[104]14 Bankr. at 631-33; 656 F.2d at 64.
[105]680 F.2d at 1135-36.
[106]*Id.* at 1136.
[107]14 Bankr. at 631.
[108]*Id.* at 631-34.
[109]*Id.* at 634 (construing Cheeseman v. Nachman, 656 F.2d 60 (4th Cir. 1981)).
[110]680 F.2d at 1137.

court cited the Supreme Court case of *Sturges v. Crowninshield.*[111] In that case, one of the questions posed was whether the constitutional grant to Congress to enact uniform bankruptcy laws was exclusive, or whether the states still retained concurrent authority to pass bankruptcy laws.[112] The Court held that:

> [T]he power granted to [C]ongress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of [C]ongress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.[113]

The court in *Sullivan* determined that Illinois was exercising its own concurrent bankruptcy power in enacting its exemption law. Therefore, because the Illinois law did not conflict with the opt-out provision of Congress, no unlawful delegation could be found.[114]

Finally, the *Sullivan* court again relied on the *Moyses* decision which addressed the unlawful delegation issue under the 1898 Act.[115] The Court in *Moyses* stated: "Nor can we perceive in the recognition of the local law in the matter of exemptions . . . any attempt by Congress to unlawfully delegate its legislative power."[116] Finding no relevant differences between the 1898 Act and the Code, the court in *Sullivan* determined that the Code likewise did not constitute an unlawful delegation.[117]

B. The Proper Resolution of the Unlawful Delegation Issue: A Two-Step Analysis

The *Sullivan* court's analysis is faulty on all three grounds. When federal and state laws conflict, the federal law is not rendered invalid. Rather, under the supremacy clause of the Constitution,[118]

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[111]17 U.S. (4 Wheat.) 122 (1819).

[112]*Id.* at 123.

[113]*Id.* at 195-96. "Partial" in this context clearly means "not general" or "not total." The word was used to mean "biased" or "discriminatory" in *Darling v. Berry*, discussed *supra*. *See* text accompanying note 86 *supra*.

[114]680 F.2d at 1137.

[115]*Id.*

[116]186 U.S. at 190.

[117]680 F.2d at 1137.

[118]U.S. CONST. art. 6, cl. 2.

the conflicting state law must yield.[119] In *Rhodes*, the debtors attacked the state law;[120] consequently, the *Rhodes* preemption analysis was warranted. However, the debtors in *Sullivan* challenged the constitutionality of the Code, not the constitutionality of Illinois law.[121] Because the delegation issue involves the propriety of congressional action, not a conflict between federal and state law, preemption is irrelevant to the unlawful delegation issue. By addressing only the preemption analysis of *Rhodes* and the possible conflict between the federal and Illinois law,[122] the *Sullivan* court clouded the essential issues in the debtors' unlawful delegation argument.

The unlawful delegation issue should properly be resolved by the application of a two-step analysis. First, it must be determined whether the opt-out provision is a recognition of concurrently held bankruptcy power, or a delegation of bankruptcy power to the states. Second, if the opt-out provision is found to be a delegation, then it must be determined whether that delegation is lawful.[123]

1. Step One: Delegated or Concurrently Held Power?—In attempting to determine the position taken by the *Sullivan* court with regard to this question, certain statements in the court's opinion, which at first appear contradictory, should be noted. The court charged that the debtors had "overlook[ed] the long-established principle that the states *retain* the power to enact bankruptcy laws,"[124] and stated that by establishing exemption laws for bankruptcy, Illinois was "exercising its *own* power."[125] These statements suggest that the opt-out provision was held to be valid in *Sullivan* because the provision did not affect the concurrent bankruptcy power of the states. However, the court also stated that "Congress has *specifically directed* that a State can choose to declare section 522(d) inapplicable to its citizens."[126] This statement clearly suggests a congressional delegation of power to the states. By making the above statements, the *Sullivan* court inadvertently pointed out something which every other court has failed to notice. That is, that under the opt-out provision, the states possess two different powers: the power to enact bankruptcy exemptions, *and* the power to deny the federal exemptions to their domiciliaries.

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[119]*See* Perez v. Campbell, 402 U.S. 637 (1971); International Shoe Co. v. Pinkus, 278 U.S. 261 (1929); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

[120]14 Bankr. 629 (Bankr. M.D. Tenn. 1981).

[121]680 F.2d at 1132.

[122]*Id.* at 1137. *See* text accompanying note 113 *supra.*

[123]*See* Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629, 631 (Bankr. M.D. Tenn. 1981).

[124]680 F.2d at 1137 (emphasis added).

[125]*Id.* (emphasis added).

[126]*Id.* at 1136.

Clearly, the first of these two powers is concurrently held by the states. The list of specific federal bankruptcy exemptions in the Code represents only a limited exercise by Congress of its bankruptcy exemption power, because debtors may continue to claim the state exemptions in bankruptcy.[127] Contrary to the opinion of the *Rhodes* court, and as the court in *Sullivan* recognized,[128] the exemptions in the Code cannot be considered as preempting state law exemptions.

Courts which have recognized the concurrent bankruptcy exemption power of the states under the Code have considered that power conclusive in supporting the constitutionality of the Code against the delegation argument.[129] However, the inquiry cannot stop here. The nature of the power which the states exercise to opt out of the federal exemptions must also be analyzed.

The power to opt out of the federal exemptions cannot logically be a concurrently held power. Unlike the power to enact state bankruptcy exemption laws, the power to deny the federal exemptions could not have existed prior to the enactment of those federal exemptions by Congress. The ability of the states to deny the federal exemptions necessarily requires the enactment of those exemptions by Congress. Furthermore, the language of the opt-out provision is clearly permissive, rather than deferential.[130] Thus, the opt-out provision must be viewed as a delegation by Congress of its bankruptcy power to the states.

2. Step Two: Lawful or Unlawful Delegation?—Having determined that Congress has delegated to the states the power to opt out of the federal exemptions, it must be determined whether that delegation is lawful or unlawful.

As noted above, the *Sullivan* court, in rejecting the debtors' unlawful delegation argument, cited the following holding in *Moyses*: "Nor can we perceive in the recognition of the local law in the matter of exemptions . . . any attempt by Congress to unlawfully delegate its legislative power."[131] The court in *Sullivan* did not discuss its interpretation of this holding. However, in at least one case, *In re Lausch*,[132] the court has understood the statement in *Moyses* to mean that, under the 1898 Act, Congress delegated to the states the authority to determine bankruptcy exemptions, but that such a

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[127]*See* Kosto v. Lausch (*In re* Lausch), 16 Bankr. 162, 165 (M.D. Fla. 1981).

[128]*See* notes 105-06 *supra* and accompanying text.

[129]*See, e.g.*, Kosto v. Lausch (*In re* Lausch), 16 Bankr. at 165.

[130]*See* Stern, *State Exemption Law in Bankruptcy: The Excepted Creditor as a Medium for Appraising Aspects of Bankruptcy Reform*, 33 RUT. L. REV. 70, 94 (1980).

[131]186 U.S. at 190.

[132]12 Bankr. 55 (Bankr. M.D. Fla.), *aff'd*, 16 Bankr. 162 (M.D. Fla. 1981).

delegation was lawful.[133] Therefore, the *Lausch* court reasoned, *Moyses* supports the congressional delegation of bankruptcy exemption power under the Code.[134]

The constitutionality of the Code on the delegation issue cannot be supported by *Moyses* for one very significant reason. The Court in *Moyses* did not find that the 1898 Act constituted a lawful delegation, but rather that, in merely recognizing state exemptions, Congress had not delegated any bankruptcy power to the states. To support its holding, the Court in *Moyses* cited the earlier Supreme Court case of *In re Rahrer*.[135] An analysis of the Court's opinion in *Rahrer* clearly supports the above conclusion and shows that the lawfulness of the delegation under the opt-out provision cannot be supported by *Moyses*.

Although later Supreme Court cases have decided that Congress may, in complex areas of legislation, leave the making of subordinate rules to selected instrumentalities,[136] the Court in *Rahrer* did not take that position. In *Rahrer*, the Court flatly stated that, "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State."[137] The Court also stated that although some laws had been sustained on the grounds "that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend . . . we do not rest the validity of the act of Congress on this analogy."[138] Furthermore, if the use of state law was upheld in *Rahrer* as a lawful delegation of power, then the states would have possessed power under a grant of authority from Congress. The Court in *Rahrer* stated, however, that Congress had not granted power to the states, but that the states were exercising power which they already possessed.[139]

Similarly, Congress, in enacting the 1898 Act, did not grant bankruptcy power to the states in the area of exemptions. The states have always had the authority to decide what property debt-

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[133]*Id.* "In enacting the opt out provision . . . Congress has *again delegated* to the states the task of determining bankruptcy exemptions." 12 Bankr. at 56 (emphasis added).

[134]12 Bankr. at 56.

[135]140 U.S. 545 (1891).

[136]*See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

[137]140 U.S. at 560.

[138]*Id.* at 562.

[139]The Court stated that the law "imparted no power to the State not then possessed, but allowed imported property to fall . . . within the local jurisdiction." *Id.* at 564.

ors may keep free from the claims of creditors in actions for attachment and execution in state courts.[140] Congress merely provided that these state laws would be recognized as the exemptions available to debtors in bankruptcy proceedings under the 1898 Act. Courts and other authorities, in referring to exemptions under the 1898 Act as governed by nonbankruptcy law, have recognized this distinction.[141] Therefore, *Moyses* cannot support the position that the opt-out provision is constitutional as a lawful delegation of congressional bankruptcy power, because there was no delegation under the 1898 Act. The question of unlawful delegation in the context of bankruptcy exemption legislation is therefore one of first impression under the Code.[142]

In addressing the delegation issue, one commentator has stated in a recent article that under the nondelegation doctrine Congress must "determine the relationship between bankruptcy and nonbankruptcy remedies."[143] Only by doing so, he argues, can Congress control the degree to which bankruptcy is encouraged or discouraged, which is a matter for Congress alone to decide.[144] The 1898 Act clearly had this effect because it tied bankruptcy exemptions to state nonbankruptcy exemptions.[145] This interpretation of the delegation issue fails to recognize, however, that if Congress enacts exclusive federal exemptions, which it is surely within its power to do,[146] it necessarily leaves the relationship between bankruptcy and non-

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[140]Bronson v. Kinzie, 42 U.S. (1 How.) 311, 315 (1843).

[141]*See In re* Rhodes, 14 Bankr. at 631 ("The [exemption] provision in the [1898 Act] . . . permitted a bankrupt to exempt only property prescribed by nonbankruptcy law—generally by state exemption statutes."); Countryman, *supra* note 25, at 2 ("In the present Bankruptcy Act . . . [t]he bankrupt is allowed such exemptions as his state laws allow him to hold exempt from creditors' claims in nonbankruptcy debt collection cases."); *see also*, Kanter v. Moneymaker (*In re* Kanter), 505 F.2d 228, 230 (9th Cir. 1974); Hertz, *Bankruptcy Code Exemptions: Notes on the Effect of State Law*, 54 AM. BANKR. L.J. 339, 343 (1980).

[142]The Bankruptcy Acts of 1800 and 1841 provided exclusive federal exemptions without reference to state laws. *See* notes 59-61 *supra* and accompanying text. Under the 1867 Act, Congress merely adopted state exemption laws as they existed in 1864, amending the law in 1873 to reflect state exemptions as they stood in 1871. *See* note 62 *supra*. As outlined above, under the 1898 Act Congress merely determined that the exemptions available to debtors in nonbankruptcy state court actions would be recognized as the exemptions in bankruptcy.

[143]Hertz, *supra* note 141, at 343.

[144]*Id.* at 343-44.

[145]*See* Kanter v. Moneymaker, 505 F.2d at 230 ("The Bankruptcy Act recognizes the exemptions provided by state law in an effort . . . to eliminate any inducement for creditors to seek involuntary bankruptcy petitions as a means of reaching assets unavailable to them in state courts because of exemption provisions.").

[146]The 1800 and 1841 Acts demonstrate this power. *See* notes 59-61 *supra* and accompanying text.

bankruptcy remedies to the states. It is not enough to say that if Congress decides that there will be only federal bankruptcy exemptions without reference to state law, that "Congress is the decision-maker."[147] In that situation, the states are clearly free to set non-bankruptcy state exemptions at any level relative to the federal exemptions. Congress has determined only that the desirability of providing debtors with the exemptions in subsection 522(d) overrides the desirable effects of tying bankruptcy to nonbankruptcy exemptions.

Although the court in *In re Rhodes* incorrectly assessed the precise nature of the power delegated under the Code,[148] it correctly recognized the considerations relevant to determining the legality of a particular delegation. In *Rhodes*, the court cited the Supreme Court's decision in *Schechter Poultry Corp. v. United States*[149] for the proposition that Congress may only delegate authority to the states if it defines the limits within which the states may exercise that authority.[150] In *Schechter*, the Court stated that:

> the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in *laying down policies* and *establishing standards*, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[151]

Therefore, in order to delegate opt-out power to the states so that the states can determine the subordinate rules of exemptions, Congress must provide the states with a *policy* and *standards* to guide them in making the opt-out decision.

The fresh start policy immediately presents itself as the only policy available to support the Code's constitutionality. The court in *Sullivan* determined that, because of the opt-out provision, the fresh start policy could be attributed only to the House version of the reform bill, and not to the final enacted version of the Code.[152] However, the context in which the *Sullivan* court reviewed the fresh start argument is readily distinguishable. In *Sullivan*, the debtors raised the fresh start policy to support their argument that the Code was unconstitutional.[153] Because the opt-out provision is a con-

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[147]Hertz, *supra* note 141, at 343.

[148]*See* text accompanying note 103 *supra*.

[149]295 U.S. 495 (1935).

[150]14 Bankr. at 631.

[151]*Id.* at 530 (emphasis added).

[152]*See* note 105 *supra* and accompanying text.

[153]680 F.2d at 1135.

gressional delegation of power to the states, recognition of the fresh start policy is necessary, instead, to support the Code's constitutionality. Also, that Congress intended to allow the states to ignore the fresh start policy is not the only possible interpretation of the opt-out provision. There is support for the view that the opt-out compromise was the result of concern by the states that a husband and wife, in a joint case, could separately choose both the state and subsection 522(d) exemptions and retain a very substantial amount of property.[154] Furthermore, courts in other cases have recognized the fresh start policy, notwithstanding the opt-out provision.[155]

Therefore, because the Code must be given a constitutional construction if possible,[156] the courts should uphold the constitutionality of the opt-out provision by recognizing a fresh start policy in the Code.

In *Schechter*, the Court recognized what "unquestionably was the major policy of Congress"[157] with respect to the act in question. Nonetheless, the Court declared the delegation of congressional power in that act unconstitutional because Congress had "supplie[d] no standards" to guide the holder of the delegated authority in exercising that power.[158] In the same respect, unless Congress has supplied those states which opt out of the federal scheme with a standard to guide them in enacting fresh start exemptions, the Code is unconstitutional. Such a standard clearly exists in subsection 522(d), the federal list of exemptions. By setting out in subsection 522(d) what it considers a fresh start set of exemptions, Congress has provided the states with a yardstick against which to measure their own exemption laws.[159] The delegation by Congress of opt-out power to the states is constitutional because it is accompanied by a fresh start policy and standards to guide the states in their exercise of that delegated power.

V. CONSEQUENCES OF THE DELEGATION ISSUE FOR THE CONSTITUTIONALITY OF STATE EXEMPTION LAWS UNDER THE SUPREMACY CLAUSE

Both the concurrent power and lawful delegation rationales will support the constitutionality of the Code on the delegation issue. It

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[154]*See* S. REP. NO. 989, 95th Cong., 2d Sess. 6, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787, 5792. *See also* CAL. CIV. PROC. CODE § 690(b) (West 1981).

[155]*E.g.*, *In re* Vasko, 6 Bankr. 317, 322 (Bankr. N.D. Ohio 1980).

[156]*See* NLRB v. Jones & Laughlin Steel Corp., 310 U.S. 1, 30 (1937).

[157]295 U.S. at 536.

[158]*Id.* at 541-42.

[159]*See* Cheeseman v. Nachman, 656 F.2d 60, 63 (4th Cir. 1981), *construed in* Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629, 634 (Bankr. M.D. Tenn. 1981).

should be recognized, however, that these two rationales have different consequences for the constitutionality of state exemption laws. Under the supremacy clause of the Constitution,[160] state laws, including exemption laws, are void to the extent that they conflict with the bankruptcy laws of Congress.[161] Such a conflict exists if the state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[162]

The concurrent power rationale does not mandate that a congressional policy and standard be found in order to uphold the constitutionality of the opt-out provision. If, as in *Sullivan*, a fresh start policy is not attributed to the Code, the states may opt out and provide no exemptions to their domiciliaries without frustrating congressional intent.[163] If a fresh start policy, though not mandated, nevertheless is found to exist, then the states' exemptions must provide debtors with a fresh start.[164]

Courts which adopt the concurrent power rationale and find a fresh start policy in the Code may simply determine the fresh start qualities of the states' exemptions in an ad hoc fashion, without reference to federal exemptions.[165] As long as the states' exemptions do not obstruct the fresh start purpose of the Code, they will be upheld. The same is not true, however, if the opt-out provision is held to be a delegation of power. The purpose of mandating that Congress provide a standard when it delegates power is to give the state legislatures and the judiciary a yardstick against which to measure the state action.

In *In re Balgemann*,[166] and in *In re Rhodes*,[167] the courts considered state opt-out legislation under the Code, and found that the exemption section of the Code indicates a policy against discriminating in favor of homeowners.[168] Under subsection 522(d)(1), a debtor may exempt $7,500 worth of real and personal property used as a residence.[169] Under subsection 522(d)(5), a debtor who does not own $7,500 worth of residential property may exempt *any property*,

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[160]U.S. CONST. art. 6, cl. 2.

[161]Perez v. Campbell, 402 U.S. 637, 649 (1971).

[162]Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[163]*See* Foster v. City Loan and Sav. Co. (*In re* Foster), 16 Bankr. 467, 469 (N.D. Ohio 1981).

[164]*See In re* Vasko, 6 Bankr. 317, 322 (Bankr. N.D. Ohio 1980).

[165]*See id.* at 320 ("A reading of the Ohio law clearly shows that it is an exemption statute with the purpose of protecting debtors and enabling them to achieve a fresh start.").

[166]Bradshaw v. Beneficial Fin. Co. (*In re* Balgemann), 16 Bankr. 780 (Bankr. N.D. Ill. 1982).

[167]Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981).

[168]16 Bankr. at 783; 14 Bankr. at 634.

[169]11 U.S.C. § 522(d)(1) (Supp. IV 1980).

not to exceed in value the unused portion of the $7,500 allowed under subsection 522(d)(1) plus $400.[170] By enacting subsection 522(d)(5), Congress intended to eliminate any discrimination between homeowners and non-homeowners, and to give "all debtors potentially the same $7,900 stake."[171] The *Balgemann* and *Rhodes* courts, finding that the exemption statutes of Illinois and Tennessee, respectively, lacked an exemption similar to that in subsection 522(d)(5) of the federal standard, invalidated the states' opt-out decisions as violative of the supremacy clause.[172]

Whether the logic of these cases will be extended to require a comparison of the *amounts* of exemptions allowed under subsection 522(d) with those in the states' statutes has yet to be determined, and is beyond the scope of this Note. At the very least, which view the courts take of the delegation issue will have serious consequences for those states which similarly discriminate against homeowners.[173] Those courts that view the opt-out provision as a delegation of power will require states' exemptions to reflect the nondiscrimination standard in section 522.

To summarize, if the concurrent power rationale is adopted, and no fresh start policy is found to have been expressed, then the states could constitutionally opt out of the federal exemptions and provide no exemptions to bankrupt debtors. If the concurrent power rationale is followed and a fresh start policy is found to exist, then states which opt out must provide bankrupt debtors with fresh start exemptions. If the lawful delegation rationale is adopted, as it should be, then the fresh start policy *must* be found to exist. Furthermore, not only must the opt-out states provide fresh start exemptions, but those exemptions must comport with the federal standards for fresh start exemptions which are set out in subsection 522(d).

VI. CONCLUSION

Although courts continue to uphold the constitutionality of the Code based on *Moyses*, this Note has shown that the Code does not meet the geographical interpretation of bankruptcy uniformity in *Moyses*. *Moyses* set forth a uniformity test of fairness of operation

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[170] *Id.* § 522(d)(5).

[171] *In re* Smith, 640 F.2d 888, 891 (7th Cir. 1981).

[172] 16 Bankr. at 783; 14 Bankr. at 634-35.

[173] A partial list of other states which have opted out and do not provide an exemption similar to that in subsection 522(d)(5) includes: Arizona, ARIZ. REV. STAT. ANN. §§ 33-1121 to -1131 (Supp. 1981); Indiana, IND. CODE § 34-2-28-1 (Supp. 1981); Kansas, KAN. STAT. ANN. §§ 60-2301 to -2310 (Supp. 1981); and Ohio, OHIO REV. CODE ANN. § 2329.66 (Page 1981).

on debtors and creditors, not the nondiscrimination test of uniformity expressed in early tax cases construing the revenue clause. When the correct interpretation of *Moyses* is applied to the opt-out provision of the Code, the Code is unconstitutional. Therefore, the *Sullivan* court incorrectly found the opt-out provision uniform under *Moyses*. If the opt-out provision is to be sustained as constitutional under the bankruptcy clause, the Supreme Court must overrule its decision in *Moyses* and expressly adopt the nondiscrimination test as the proper test of uniformity under the bankruptcy clause.

This Note also has shown that the *Sullivan* court's resolution of the delegation issue was wrong. The power to opt out of the federal exemptions in subsection 522(d) cannot be a power held concurrently by the states, and therefore must have been congressionally delegated. When Congress delegates authority it must provide the states with a policy and standards to guide them in exercising the delegated power. Therefore, for the opt-out provision to be constitutional, the courts should find that a fresh start policy has been expressed in the Code, and that subsection 522(d) reflects the standards for that policy.

Finally, this Note has pointed out that the resolution of the delegation issue will have consequences for the constitutionality of state exemption laws. The courts should consider those consequences in resolving the unlawful delegation issue.

RICHARD C. RICHMOND

The Interpretive Rule Exemption: A Definitional Approach to Its Application

I. INTRODUCTION

The growth of the federal regulatory establishment and the corresponding increase in federal regulatory action are matters that affect every citizen.[1] In light of the pervasive effect of these federal regulatory actions, the procedures set forth in the Administrative Procedure Act (APA)[2] to guide and to control agency activity are important to both the agencies and the public.

One of the most significant provisions of the APA requires federal agencies, before adopting a rule, to give general notice of and to offer the public an opportunity to comment on the proposed agency action.[3] The notice and comment provision applies to agency rules, which

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[1]STAFF OF SENATE SUBCOMM. ON REGULATORY REFORM, REPORT ON THE REGULATORY REFORM ACT, S. REP. NO. 284, 97th Cong., 1st Sess. 9-50 (1981) [hereinafter cited as SENATE REPORT]. The degree of regulatory growth is reflected by the effect of regulations on our Gross National Product (GNP). In 1965, federal regulations affected 8.2% of the GNP; by 1975, federal regulations affected 23.7% of the GNP. *Id.* at 9 (citing P. MACAVOY, THE REGULATED INDUSTRIES AND THE ECONOMY 25 (1979)). In addition, compliance costs with federal regulations are approximately $100 billion a year—about one-fifth the size of the federal budget. STAFF OF JOINT ECONOMIC COMM., 96TH CONG., 2D SESS., GOVERNMENT REGULATION: ACHIEVING SOCIAL AND ECONOMIC BALANCE, SPECIAL STUDY ON ECONOMIC CHANGE (Comm. Print 1980).

[2]5 U.S.C. §§ 551-559 (1976).

[3]*Id.* Section 553 provides in part:

Rule making

. . . .

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through

are defined in the APA as agency statements designed to "implement, interpret, or prescribe law or policy."[4] In requiring an agency to act like a legislative body when the agency issues such legislative rules, Congress intended to protect the interests of the public from the arbitrary exercise of power by agencies.[5]

Despite the importance of notice and comment proceedings, Congress recognized that certain agency activities were merely administrative and that the impact of such actions was minimal. For these agency actions, Congress found that the value of imposing an opportunity for public comment was outweighed by the need for efficient and effective agency administration.[6] Therefore, Congress exempted certain agency actions from the APA notice and comment requirements[7] and required the agency only to give notice of the rule in the Federal Register.[8]

Included in the exemption from notice and comment proceedings

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submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

[4]5 U.S.C. § 551(4) (1976) provides in part:

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

[5]*See* ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 102-03 (1941) [hereinafter cited as COMMITTEE REPORT].

[6]*See* STAFF OF SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1946, at 18 (1947) [hereinafter cited as 1945 SENATE COMM. PRINT].

[7]5 U.S.C. § 553(b)(A) (1976). This section of the APA exempted interpretive rules, general statements of policy, rules of agency organization, procedure, or practice from rule making requirements except when notice or hearing is required by statute. This Note uses the term "rule making" to represent the notice and comment proceedings set out in 5 U.S.C. § 553 (1976).

[8]*Id.* § 552(a)(1)(D).

are interpretive rules.[9] Interpretive rules generally are considered administrative actions that merely explain to the public the agency's understanding and interpretation of relevant statutory language.[10] The APA, however, never defined the term "interpretive rule." More importantly, the APA gave no indication of what distinguishes interpretive rules from legislative rules, which also may "interpret, or prescribe law or policy."[11]

Whether a rule is interpretive or legislative determines the applicability of the notice and comment proceedings.[12] Generally, the label attached by the agency indicates what procedures the agency will follow in promulgating a rule. However, many parties adversely affected by a rule labeled interpretive have challenged the agency's failure to follow notice and comment proceedings for rules that the challenging parties claim are actually legislative.[13] In arbitrating these disputes, the courts have fashioned vague, confusing, and often conflicting criteria for distinguishing interpretive from legislative rules.[14] Criticizing this judicial reluctance to formulate consistent, precise guidelines, one distinguished judge recently stated: "this court accepts with alacrity the authoritative view that it is not profitable to explore the asserted distinction between legislative rules and interpretive rules which is 'fuzzy at best.' "[15]

The dilemma in applying the interpretive rule exemption has not gone unnoticed by Congress.[16] Currently pending is a proposed

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[9]*Id.* § 553(b)(A). This Note is limited to the exemption for interpretive rules. The APA and other sources use the term "interpretative," but for stylistic reasons this Note will use the term "interpretive."

For an excellent discussion regarding the exemption for general statements of policy, see Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976) [hereinafter cited as CHICAGO Comment].

[10]COMMITTEE REPORT, *supra* note 5, at 27.

[11]*See* 5 U.S.C. § 551 (1976).

[12]*See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:8 (2d ed. 1979 & Supp. 1982) [hereinafter cited as TREATISE].

[13]*See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Morton v. Ruiz, 415 U.S. 199 (1974); Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980); Energy Consumers and Producers Ass'n v. Department of Energy, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980); Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978).

[14]*See* notes 22-53 *infra* and accompanying text.

[15]National Nutritional Foods Ass'n v. Weinberger, 376 F. Supp. 142, 146 n.6 (S.D.N.Y. 1974).

[16]Congressional concern regarding this provision of the APA is reflected in recent legislation. See The Regulatory Reform Act, S. 1080, 97th Cong., 1st Sess. (1981) [hereinafter cited as Regulatory Reform Act], which was passed by the Senate on March 24, 1982 (128 CONG. REC. 52713 (1982)) and The Regulatory Procedure Act of 1982, H.R. 746, 97th Cong., 2d Sess. (1982) [hereinafter cited as Regulatory Procedure Act] which should go to the full House of Representatives for a vote before the end of the 97th Congress.

APA amendment that would limit the interpretive rule exemption to rules that do not "directly and substantially alter or create rights or obligations of persons outside the agency."[17] Although the language of the House and Senate amendments differs slightly,[18] Congress hopes the amendment will untangle the web created by the original APA.[19] The proposed language alone, however, does not give the federal agencies or the courts the guidance necessary to apply the exemption with confidence. Furthermore, the Senate and the House seem to be at odds on how the amended exemption should be applied.[20]

Drawing upon both judicial and legislative materials, this Note advocates a definitional approach for applying the exemption.[21] To properly categorize the agency action, this Note proposes a two-step analysis for determining when an agency action is interpretive and therefore exempt from rule making procedures. The first step determines whether the agency has the delegated authority to issue legislative rules. The next step determines whether the agency has acted pursuant to this legislative power; that is, whether the agency is acting in its legislative capacity or in its administrative capacity. To make this determination, the impact of the agency's action on the legal and practical interests of the affected party must be considered.

If the agency action creates a new legal right or obligation, then it affects the party's legal interests and will be deemed to have the substantial impact of a legislative rule. By contrast, altering existing rights or obligations without creating new ones may burden or benefit a party's practical interests. When an agency action is considered

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[17]Regulatory Reform Act, *supra* note 16, § 553(a)(4) (amending 5 U.S.C. § 553(b)(A) (1976)).

[18]The Regulatory Procedure Act states that the exemption does not apply to an interpretive rule that "has general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency." Regulatory Procedure Act, *supra* note 16, § 553(a)(3) (amending 5 U.S.C. § 553(b)(A) (1976)).

[19]*See* SENATE REPORT, *supra* note 1, at 110-14.

[20]*Compare* S. REP. NO. 284, 97th Cong., 1st Sess. 110-14 (1981) *with* H.R. REP. NO. 435, 97th Cong., 2d Sess. 59-63 (1982).

[21]For recent discussions on the application of the interpretive rule exemption, see TREATISE, *supra* note 12, §§ 7:1-7:20 (1979); Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101 (1971); Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976); Warren, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretative Rules*, 29 AD. L. REV. 367 (1977); Note, *Administrative Law—The Legislative-Interpretative Distinction: Semantical Feinting with an Exception to Rulemaking Procedures*, 54 N.C.L. REV. 421 (1976); CHICAGO Comment, *supra* note 9; Comment, *Revenue Rulings and the Federal Administrative Procedure Act*, 1975 WIS. L. REV. 1135.

to affect a party's practical interests, it will be deemed to have the impact of a legislative rule if the action has a significant effect on the regulated parties and the source of this effect is a dramatic change from the agency's established position or policy.

This two-step definition allows an agency action to be classified as interpretive or legislative and, as a result, allows the proper application of the interpretive rule exemption. If an agency has the authority to issue legislative rules and exercises that authority, then its action is legislative and subject to the requirement for notice and comment. If the agency intends merely to exercise administrative power, its action is properly classified as interpretive and exempted from rule making only if that action does not have the substantial impact of a legislative rule.

II. The Dilemma in Applying the Interpretive Rule Exemption

A. Case Law

The difficulty in distinguishing interpretive rules and legislative rules is longstanding and has a tangled history.[22] With no definition of interpretive rules provided by the APA, authorities have disagreed on what the distinguishing characteristics of an interpretive rule are.[23] As a result, the courts have devised two inconsistent methods of analysis for determining which regulations are exempt: the legal effect test objectively classifies a rule as interpretive before applying the exemption;[24] the substantial impact test exempts rules based on whether it is subjectively fair to allow the agency to act without public opportunity for notice and comment.[25]

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[22]*See* Davis, *Administrative Rules—Interpretive, Legislative and Retroactive*, 57 YALE L.J. 919 (1948); Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 29 (1940) [hereinafter cited as Lee *Article*].

[23]Professor Davis has always maintained that the legislative authority is the only distinguishing factor between interpretive rules and legislative rules. *See* Davis, *supra* note 22. Other commentators have generally accepted the difficulty in distinguishing these two types of rules and looked for alternative solutions to the interpretive rule exemption. *See* Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977) (this Article admits the blurring line between interpretive and legislative rules and suggests postadoption rule making procedures when the classification of the rule is challenged); Koch, *supra* note 21 (this Article suggests the use of the "good cause exemption"). *See also* note 21 *supra*.

[24]*See, e.g.*, Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974); Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952); Chemical Specialties Mfrs. Ass'n v. EPA, 484 F. Supp. 513 (D.D.C. 1980).

[25]*See, e.g.*, Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

1. Legal Effect Standard.—The objective legal effect test is the more popular method of analysis with the courts.[26] This test attempts to define the rule as legislative or interpretive before applying the exemption. To make this determination, the court relies upon the legal effect distinction set out in the Attorney General's Manual on the Administrative Procedure Act. The Manual reveals that a legislative rule is to have a definite legal effect on the regulated party by withholding a benefit or imposing a penalty for noncompliance.[27] On the other hand, an interpretive rule is to have no effect other than alerting the public to the agency's opinion on the statutory law.[28]

The leading case on the legal effect standard, *Gibson Wine Co. v. Snyder*, was handed down in 1952 by the United States Court of Appeals for the District of Columbia.[29] Gibson Wine Company challenged the rule making exemption for an Internal Revenue Service (IRS) rule that required all wine made from the boysen variety of the blackberry to be labeled boysenberry wine. Gibson Wine Company claimed that the rule was legislative because the IRS had attempted to modify or amend the statute. The IRS treated the rule as interpretive and thus exempt, because the IRS construed the rule merely as a clarification of the statutory provision regarding the labeling of fruit wines. Prior to the promulgation of this rule, however, the IRS had no consistent policy on the labeling requirement for boysenberry wine, and Gibson Wine Company had been labeling the wine as blackberry wine with IRS approval.

In finding that the agency correctly treated the rule as interpretive, the court relied upon the definition of an interpretive rule as "one which does not have the full force and effect of a substantive rule but which is in the form of an explanation of particular terms in an Act."[30] Although the court briefly mentioned the gray area where it is difficult to distinguish interpretive rules from legislative rules that interpret statutes, the court ignored this dilemma and held the agency action to be an interpretive rule exempt from notice and comment proceedings.[31] The court claimed to

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[26]*See, e.g.*, Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974); Chemical Specialties Mfrs. Ass'n v. EPA, 484 F. Supp. 513 (D.D.C. 1980); *see generally* Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978); National Restaurant Ass'n v. Simon, 411 F. Supp. 993 (D.D.C. 1976).

[27]UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter cited as ATT'Y GEN'S MANUAL].

[28]*Id.*

[29]194 F.2d 329 (D.C. Cir. 1952).

[30]*Id.* at 331 (quoting Reich, *Rulemaking Under the Administrative Procedure Act*, 7 N.Y.U. SCH. L. INST. PROC. 492, 516 (Feb. 1947)).

[31]*Id.* at 332.

base this conclusion on the "distinctive characteristics of interpretive rules," but the court evidently looked to the "interpretive" label attached by the agency and to the agency's treatment of the rule as interpretive.[32]

The court's approach to resolving the application of the interpretive rule exemption makes the classification of a rule as interpretive appear simple. The dissent, however, reveals other criteria for classifying a rule not addressed by the majority.[33] For example, in considering the clarity of the governing statute, the dissent found no ambiguity in the statute regarding the labeling of fruit wines. The dissent argued that the agency therefore could not be issuing a clarification because the statute was not ambiguous.[34] Further, the dissenting judge looked beyond the mere label of the rule and considered its impact: the IRS rule required compliance, and such compliance would have an economic impact on the Gibson Wine Company.[35] Weighing these additional criteria, the dissenting judge would have found that the rule was legislative and thus invalid because notice and comment proceedings were not followed.[36]

Gibson Wine Co. illustrates that the legal effect test focuses on a single criterion in determining whether a rule is interpretive. If a rule is legally binding, it affects a party's rights and is a legislative rule; if a rule has no legally binding effect, then it is an interpretive rule. This test allows some predictability in the application of the exemption; however, in classifying the rule, the court relies only upon the agency's labeling of the rule and does not consider the rule's impact.

2. The Substantial Impact Standard.—Responding to the failure of the legal effect standard to include the impact of the rule on the regulated parties, some courts have devised a substantial impact test.[37] Courts applying this test focus on the impact of the rule and give little weight to the agency's classification. The underlying rationale for this approach is that fairness requires notice and comment proceedings when the impact of the rule is substantial.

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[32]194 F.2d at 331-34.

[33]*Id.* at 334-36 (Miller, J., dissenting).

[34]*Id.* at 334. The dissenting judge examined the 1938 statute regarding the labeling of fruit wines and found "[t]his was and is a plain, straightforward, easily understood regulation providing that wine produced from the blackberry shall be called 'blackberry wine.' There is no qualification, limitation, restriction or ambiguity in it." *Id.*

[35]*Id.* at 335-36.

[36]*Id.*

[37]*See* Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288 (D.D.C. 1973); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

A leading case on the substantial impact test was decided by the District Court of Delaware in 1970. In *Pharmaceutical Manufacturers Association v. Finch*,[38] the drug companies challenged a regulation issued without notice and comment proceedings by the Food and Drug Administration (FDA). The regulation limited the type of evidence that the FDA would consider in determining a drug's effectiveness. The FDA had no previous uniform policy for the type of evidence to be submitted, and, prior to the rule, the agency had accepted a broad range of such information from the drug companies.[39]

To determine whether the regulation was exempt from rule making, the court rejected the definitional labels of interpretive or legislative. Instead, the court considered whether the impact of the rule was so substantial that rule making was necessary.[40] The court looked to two criteria to determine whether the impact was substantial: whether the regulations were pervasive in scope and whether the regulations had an immediate and substantial impact.[41] In concluding that the regulations had a substantial impact, the court found that the FDA regulations "apply to more than 2000 drug products . . . and place all of them in jeopardy, subject to summary removal by order of FDA."[42]

As the FDA rule met the criteria for substantial impact, the court then considered whether the impact of the rule was caused by the requirements of the underlying statute or by the agency's action.[43] The purpose for this inquiry was to determine whether the agency was merely interpreting statutory language or whether the agency was using its legislative power to enact a legislative rule. To determine the source of the impact the court considered whether the agency action was a dramatic change and whether confusion and controversy resulted from the agency action.[44]

In applying these criteria the court found that the agency action created a dramatic change because "the administrative practice applying the statutory standard to drugs marketed before 1962 has not uniformly insisted on evidence produced in accordance with the . . . [new] regulations."[45] In addition, the court found that "considerable confusion and controversy" surrounded the regulations.[46] Thus, the

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[38]307 F. Supp. 858 (D. Del. 1970).
[39]*Id.* at 864.
[40]*Id.* at 863.
[41]*Id.* at 864.
[42]*Id.*
[43]*Id.* at 864-65.
[44]*Id.* at 865-68.
[45]*Id.* at 864.
[46]*Id.* at 865.

court was persuaded that the regulation was a legislative action by the agency, and held the agency rule to be invalid because notice and comment proceedings had not been followed.[47]

The substantial impact standard was broadened in 1972 when the United States Court of Appeals for the Second Circuit held that any change in existing rights and obligations was a substantial impact.[48] In *Lewis-Mota v. Secretary of Labor*,[49] aliens challenged the Secretary of Labor's decision to stop issuing lists of jobs available to alien workers without providing notice and comment proceedings. Prior to the Secretary's action, aliens could rely upon this job information when applying for a permanent visa. As a result of the Secretary's action, aliens seeking certification for permanent visas were required to submit specific evidence of a job offer. In addition, those aliens already certified but waiting for a permanent visa had to revalidate their certification; however, they could retain their priority position for a visa if they could show a job offer.

The district court held that the Secretary's action was interpretive because it did not prejudice the aliens' priority status for permanent visas, nor did it alter or create legal rights or obligations.[50] The appellate court rejected the lower court's holding and found the action invalid because there was no opportunity to comment on the action.[51] Although the rule only affected the existing rights and obligations of aliens and any prospective employers without creating new ones, the court found that this effect was substantial enough to create the need for notice and comment proceedings.[52]

Thus, the substantial impact test fills a void in the legal effect test by looking to the impact of the rule. However, this approach does not classify a rule as interpretive but utilizes the vague concept of fairness to determine whether rule making is required. As a result, the determinations under the substantial impact test are not as predictable as under the legal effect standard. In addition, many courts have rejected the substantial impact test because they do not find it supported by the congressional intent for exempting interpretive rules.[53]

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[47]*Id.*

[48]Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972). See also the opinion of the district court, Lewis-Mota v. Secretary of Labor, 337 F. Supp. 1289 (S.D.N.Y. 1972).

[49]469 F.2d 478 (2d Cir. 1972).

[50]337 F. Supp. at 1289.

[51]469 F.2d at 482.

[52]*Id.*

[53]*See* Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082, 1093-98 (Temp. Emer. Ct. App. 1978). The court in discussing the substantial impact test found that "[t]he words 'substantial impact' do not appear in § 553 of the APA. They constitute an unwarranted judicial gloss on the statute misapplied in the context of these cases." *Id.* at 1094.

B. The Proposed Amendment to the Interpretive Rule Exemption

The dilemma surrounding the interpretive rule exemption has not gone unnoticed by Congress. Both the United States Senate and House of Representatives have proposed similar amendments to the interpretive rule exemption.[54] The congressional intent that the impact of the rule should be considered in applying the interpretive rule exemption is clear from the language of the amendments. However, the proposed language does not indicate how the impact of the rule should be measured or how the measured impact should be utilized in determining whether a rule is exempt.

Unfortunately, the House and Senate Reports do not offer clear interpretations of the proposed amendments.[55] The Reports also are at odds on the important questions presented by the amendment. The Senate Report seems to imply that the impact of a regulation on a party's rights and obligations should be considered in classifying a rule as interpretive;[56] however, the House Report states that the rule's impact determines whether the rule is exempt from notice and comment proceedings.[57]

1. The Senate Amendment.—The proposed Senate amendment would exempt an interpretive rule from notice and comment proceedings "unless it has general applicability and substantially alters or creates rights or obligations of persons outside the agency."[58] Interpreting the amendment, the Senate Report states that the "ultimate impact of the rule must be the basic criterion for application of the exemption."[59] This statement offers guidance in applying the exemption by directing consideration to the impact of the rule; however, it does not delineate how to measure that impact.

The Senate Report does describe circumstances where the degree of the impact is sufficient to require rule making, including "severe consequences" from the interpretive rule, and rights or obligations "substantially altered."[60] These descriptive terms indicate a fairly high threshold for the impact test. This would be consistent with the Senate Report's conclusion that, to require rule making,

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[54]*See* note 16 *supra.*

[55]*Compare* S. REP. NO. 284, 97th Cong., 1st Sess. 110-14 (1981) *with* H.R. REP. NO. 435, 97th Cong. 2d Sess. 59-63 (1982).

[56]*See* SENATE REPORT, *supra* note 1, at 110-14.

[57]*See* STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, REPORT ON THE REGULATORY PROCEDURE ACT, H.R. REP. NO. 435, 97th Cong., 2d Sess. 59-62 (1981) [hereinafter cited as HOUSE REPORT].

[58]Regulatory Reform Act, *supra* note 16, § 553(a)(4) (amending 5 U.S.C. § 553(b)(A) (1976)).

[59]SENATE REPORT, *supra* note 1, at 113.

[60]*Id.* at 112. The Report also discusses the impact of the future effect of the rule and the effect of a dramatic change. *Id.*

the impact of a rule must be more severe than simply affecting a party's expectations.[61]

Other authority relied upon by the Senate Report does not require a significant effect to find a substantial impact.[62] The substantial impact cases cited by the Senate Report[63] employ a low threshold for finding a substantial impact.[64] The most striking example is the 1967 decision by the District of Columbia District Court in *National Motor Freight Traffic Association v. United States*.[65] In that case the freight carriers objected to an optional, informal procedure announced by the ICC that would allow shippers and carriers to voluntarily settle an overcharge dispute. The court found that the effect on the regulated parties from this completely optional procedure was not "so insignificant in nature . . . as to fall outside the rule-making requirements."[66]

In addition to imposing confusing standards for measuring the impact, the Senate Report is ambiguous in explaining whether the impact of the rule is used to identify an interpretive rule or to indicate when fairness requires rule making.[67] By exempting an interpretive rule "unless . . . ," the plain language of the amendment could be construed as acknowledging two types of interpretive rules: those which are exempt and those which are not exempt.[68] Thus, a rule could be interpretive, but because it "substantially . . . alter[s] or create[s] rights or obligations," it would not be exempt from rule making.[69]

The text of the Senate Report, however, supports the conclusion that the amendment language was intended to be used as a definitional tool. The Senate Report states that "an agency 'interpretation' . . . which has the effect of creating or altering obligations or rights is not an 'interpretive rule' . . . within the meaning of this ex-

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[61]*Id.* at 114.

[62]*Id.* at 112-14 (discussing, among other cases, Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Stubbs, Overbeck & Assoc. v. United States, 445 F.2d 1142 (5th Cir. 1971)).

[63]SENATE REPORT, *supra* note 1, at 113-14.

[64]*See* notes 38-53 *supra* and accompanying text.

[65]268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

[66]*Id.* at 95.

[67]*See* SENATE REPORT, *supra* note 1, at 110-14.

[68]*See* Regulatory Reform Act, *supra* note 16, § 553(a)(4).

[69]*See* SENATE REPORT, *supra* note 1, at 111. This interpretation of the proposed language is supported by the Senate Report's reference to Professor Davis, who has stated that "[t]he main occasion for judicial requirement of notice and comment procedure for rule making that is exempt from § 553 has to do with adoption of interpretative rules that have significant impact upon affected persons." *Id.* at 111 (quoting K. Davis).

emption."[70] This recognizes the distinction between agency rules that interpret and interpretive rules that explain or clarify. This statement indicates that the Senate intended one type of interpretive rule, the proper classification of which would determine the applicability of the exemption.

2. The House Amendment.—The amendment proposed by the House states that the notice and comment proceedings will not apply to "any interpretative rule . . . other than an interpretative rule . . . that has general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency."[71]

The House Report[72] interpreting this amendment is straightforward on how the impact of an agency action should be measured and how that substantial impact should be utilized in applying the exemption. The test set out by the House Report for determining substantial impact is composed of three essential elements: the impact must be substantial, the impact must be upon substantive rights or obligations, and the impact must affect persons outside the agency.[73] This test alone is little more illuminating than the proposed statutory amendment. Thus, the House Report attempts to draw boundaries by limiting a substantial impact to an impact which "cannot be incidental or trivial but instead must be palpable and significant."[74] Because substantial is a measurement that is relevant only in relation to the degree of other impacts, by defining substantial with other relative words, the House Report's definition makes it difficult to determine what constitutes a substantial impact.

The cases relied upon by the House Report to illustrate substantial impact create more confusion than clarity. The House Report endorses the finding of substantial impact in *Pharmaceutical Manufacturers Association v. Finch*[75] where the FDA acted to limit, for the first time, the nature of the evidence required to provide substantial evidence of a drug's effectiveness. However, the House Report states that "Revenue Rulings . . . are classic examples of interpretative rules"[76] and cites *National Restaurant Association v. Simon*[77] as an illustration. In *National Restaurant*, the IRS imposed a new and costly reporting requirement compelling employers to

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[70]SENATE REPORT, *supra* note 1, at 112.

[71]Regulatory Procedure Act of 1982, HOUSE REPORT, *supra* note 57, at 90-91.

[72]*See* HOUSE REPORT, *supra* note 57, at 59-62.

[73]*Id.* at 61.

[74]*Id.*

[75]307 F. Supp. 858 (D. Del. 1970). *See also* notes 38-47 *supra* and accompanying text.

[76]HOUSE REPORT, *supra* note 57, at 62.

[77]411 F. Supp. 993 (D.D.C. 1976).

keep records of the charge tips paid to employees and to report them to the IRS. The court found that these requirements were within the IRS's authority and that the Revenue Ruling did not have a substantial impact.[78]

The IRS rule in *National Restaurant* appears to have an impact that is greater than incidental or trivial; thus, it is difficult to rationalize why the impact of the FDA's action in *Pharmaceutical Manufacturers* was substantial, but the impact of the IRS reporting requirement in *National Restaurant* was not.[79] If the Revenue Ruling cases fairly illustrate the type of impact the House considered to be insignificant, then the House intended the substantial impact to be a very strict test. However, in comparing the impact of these Revenue Ruling cases with *Pharmaceutical Manufacturers*, it is difficult to discern what effect is sufficient to make a rule's impact substantial.

Although it is difficult to determine how the House intends to measure the rule's impact, the House Report expressly states how the substantial impact should be applied. According to the House Report, "it is only after an agency action is classified as an interpretive rule . . . that new subparagraph 553(a)(3) imposes a new statutory obligation."[80] Thus, the new language would give a statutory basis for requiring certain interpretive rules to be subject to notice and comment proceedings.[81] This indicates that the House recognizes two different types of interpretive rules: those that have an insignificant impact and therefore are exempt from notice and comment proceedings, and those that have a substantial impact and must be subject to formal rule making proceedings.

In rejecting the consideration of the rule's impact in classifying the rule, the House Report states that "the fundamental differences between the legal status of legislative rules and interpretive rules . . . should not always dictate the applicability of procedural requirements."[82] This rationale ignores the policy reasons for exempting interpretive rules. Congress originally exempted rules that were properly classified as interpretive because the effect of these rules

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[78]*Id.* at 999.

[79]*See also* Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974). In this case, certain poor people challenged an IRS Revenue Ruling that changed the long-standing definition of the word charitable, so that a hospital could now qualify as a tax-exempt organization without providing free or below-cost service to those unable to pay. The court found that this action was merely an interpretation of the statutory law and did not have a substantial impact. In his dissent, Judge Wright pointed out that the effect of the agency's action was a substantial change in the availability of hospital services for the poor.

[80]HOUSE REPORT, *supra* note 57, at 61.

[81]*See id.* at 60.

[82]*Id.* at 59.

was not substantial enough to trigger the need for notice and comment proceedings.[83]

The House Report also states that Congress does not intend the proposed amendment to the interpretive rule exemption to "otherwise overrule, change or in any [way] affect the current practices of courts in determining whether a particular agency action is a legislative rule, [or] an interpretive rule . . . ."[84] Yet, at the same time, the House Report rejects the use of the substantial impact test to determine whether the rule is legislative.[85] Thus, it appears that the House Report relies upon the cases which employ the legal effect test to determine whether a rule is legislative or interpretive.

The application of the exemption as set forth in the House Report does not solve the original problem with the interpretive rule exemption; that is, determining whether the agency has promulgated an interpretive or legislative rule. The House Report accepts the definition of an interpretive rule as one that " 'advise[s] the public of the agency's construction of the statutes and rules which it administers.' "[86] This definition, however, is the original definition from the 1941 Attorney General's Manual and does not untangle the problem created by the courts in trying to define an interpretive rule.[87]

III. The Definitional Approach to the Interpretive Rule Exemption

The proposed amendment to the APA could mark a new beginning for the interpretive rule exemption. This will occur, however, only if the ambiguities and conflicts surrounding the interpretive rule exemption are resolved and the application of the exemption produces clear, consistent results. To achieve these objectives, this Note advocates a definitional approach to the application of the exemption. A definitional approach would preclude a court from imposing notice and comment proceedings based on a fairness analysis. Rule making procedures would be determined by classifying an agency action as legislative or interpretive.

The definitional approach is superior to the fairness analysis because it is more likely to produce the results that Congress intended when it created the exemption for interpretive rules. Congress exempted interpretive rules from notice and comment proceedings after weighing the public's need to know the agency's posi-

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[83]*See* notes 88-96 *infra* and accompanying text.

[84]House Report, *supra* note 57, at 61-62.

[85]*Id.* at 61.

[86]*Id.* at 60 (quoting Atty Gen's Manual, *supra* note 27, at 30 n.3).

[87]*See* notes 22-25 *supra* and accompanying text.

tion on substantive matters and the public's need for procedural safeguards against agency action.[88] Because interpretive rules have no binding effect on the regulated parties or the courts,[89] Congress concluded that notice and comment proceeduings were not a necessary precaution for interpretive rules.[90] In addition, a party affected by an interpretive rule was protected by other procedures in the APA, including "an opportunity for private persons to secure a reconsideration of such rules . . . and plenary judicial review."[91]

More importantly, Congress exempted interpretive rules because it "desired to encourage the making [public] of such rules."[92] Congress was aware that agencies issue many interpretive rules that directly and indirectly affect the public.[93] The rules, however, are inside information and, unless the agency willingly reveals its views or interpretations, such information will remain unknown.[94] If

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[88]1945 SENATE COMM. PRINT, *supra* note 6, at 18. The report stated three reasons for exempting interpretive rules from rule making procedures:

> First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

Id.

[89]*See* COMMITTEE REPORT, *supra* note 5, at 99-100. The Committee Report looks to the consequences of the rule to find it has no immediate legal effect. It states that interpretive rules "do not receive statutory force and their validity is subject to challenge in any court proceeding. . . . The statutes themselves and not the regulation remain in theory the sole criterion of what the law authorizes or compels."*Id.*

[90]*See* 1945 SENATE COMM. PRINT, *supra* note 6, at 18. It is important to realize that in reaching this conclusion Congress not only considered the inherent distinctions between the rules but also looked to the consequences that flow from these rules. See also CHICAGO Comment, *supra* note 9, at 439-55, for an interesting discussion of the relationship between the purpose of rule making and the function of the exemption.

[91]1945 SENATE COMM. PRINT, *supra* note 6, at 18. The report is making reference to other provisions in the APA which are intended to protect the public's interest. 5 U.S.C. § 553(e) (1976) provides that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 706 (1976) provides for de novo review for rules which have not followed formal rule making procedures.

[92]1945 SENATE COMM. PRINT, *supra* note 6, at 18.

[93]*Id.* This is still true today. In a recent article, M. Asimow found that "interpretive rules and policy statements are of great importance to the public in alerting them to the agency's position on substantive matters. They frequently have a substantial impact on the affairs of large segments of the public because they definitely affect the behavior of agencies and interested persons or groups." Asimow, *supra* note 23, at 528-29.

[94]*See* COMMITTEE REPORT, *supra* note 5, at 27. Because an interpretive rule is the

an agency were forced to go through notice and comment proceedings for all interpretive rules, Congress feared that the burden on the agency would be too great[95] and that the agency would "go underground" with all its inside information rather than comply with notice and comment proceedings.[96] Thus, because of the interpretive rule's minimal impact on a regulated party and the importance of making such rules public, Congress exempted interpretive rules from notice and comment proceedings as an incentive for the agencies to promulgate their opinions and clarifications of statutes, rules, and policies.

Some courts and commentators argue that a fairness analysis of an agency action allows the courts to apply the procedural requirements of the APA in a manner that most clearly achieves the results intended by Congress.[97] Although an approach which considers whether it is fair for the agency to proceed without notice and comment proceedings does provide flexibility to the system, this benefit may undermine the purpose for the exemption. The flexibility in this approach is based on the court's application of the vague and subjective standard of fairness. As a result, it is likely that decisions based on a fairness analysis would create inconsistent determinations and would not clearly indicate to the agencies the type of rules that are exempt from notice and comment proceedings.[98]

A definitional approach would force courts to grapple with the classification of a rule. This task would be difficult and would certainly involve an impact test that weighs the fairness of exempting an agency action which has an impact on the regulated party's interests. The courts, however, would focus on the more precise determination of when an agency action is an interpretive rule, rather than whether it is fair to exempt the agency action from notice and comment proceedings. This approach should eventually produce clearer guidelines for the agencies regarding the characteristics of an interpretive rule. Thus, the agencies would have some indication of what actions are interpretive rules and fall within the inter-

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agencys' belief or opinion regarding a statute, other law, or rule, the agency may simply send such information to its employees and agents, without making such information public. No present provision in the APA requires that such inside information be made public. *See* 5 U.S.C. § 553 (1976).

[95]*See* 1945 SENATE COMM. PRINT, *supra* note 6, at 18.

[96]The phrase "go underground" refers to the possibility that agencies could operate according to secret, undisclosed policies in order to avoid the rule making requirements. *See* Bonfield, *supra* note 21, at 113.

[97]*See* TREATISE, *supra* note 12, § 7:18.

[98]*See* notes 37-52 *supra* and accompanying text. The results in the cases following the substantial impact test indicate that a fairness analysis does not produce a consistent standard.

pretive rule exemption. The definitional approach, and not the fairness analysis, will create an atmosphere that encourages agencies to publish their policies and opinions on the statutory law.

In addition to furthering the basic policy behind the interpretive rule exemption, a definitional approach would avoid a conflict with the recent Supreme Court decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[99] In reviewing the appellate court's finding that the agency's rule making procedures were inadequate, the Supreme Court held that courts cannot impose on agency actions any procedural requirements greater than those imposed by section 553 of the APA.[100] The Supreme Court found that the legislative history of the APA "leaves little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed."[101]

If notice and comment proceedings are required for an interpretive rule on the basis of fairness, the court would be substituting its judgment for the agency's discretionary decision regarding the best procedure for promulgating an agency action. Although the proposed amendment to the interpretive rule exemption may be construed as giving courts the statutory authority to impose notice and comment proceedings, this approach would contradict the rationale for the decision in *Vermont Yankee*. In *Vermont Yankee*, the Supreme Court realized that if courts were allowed to continually review the adequacy of agency proceedings, the results would be unpredictable, and, as a direct consequence, agencies would impose strict procedures in order to avoid reversal by the courts.[102] An analogous result would occur if the proposed APA amendment were interpreted as giving the courts the statutory authority to order an agency to proceed with notice and comment proceedings for an interpretive rule. The incentive for issuing interpretive rules would evaporate. Agencies would go underground with their interpretations to avoid the burden of notice and comment proceedings, a result in clear contravention of congressional intent.

A definitional approach also avoids problems resulting from having two types of interpretive rules: interpretive rules subject to notice and comment proceedings and interpretive rules that are exempt. Under the original APA, distinct consequences flow from the valid classification of the agency's action. A valid legislative rule is given the force and effect of law and is subject to limited review by the

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[99]435 U.S. 519 (1978).

[100]*Id.* at 544-46.

[101]*Id.* at 546.

[102]*Id.* at 546-47.

courts; a valid interpretive rule has no legally binding effect and is subject to full review by a court.[103] These different consequences are keyed to the requirement for rule making procedures.

If the application of the interpretive rule exemption allowed a rule to be classified as interpretive but treated as a legislative rule for rule making procedures, all the consequences flowing from a proper classification would be upset. If all interpretive rules are considered to have no legally binding effect regardless of the promulgation procedure, then the time and energy an agency employs in holding notice and comment proceedings for a nonbinding interpretive rule will be an inefficient use of time. However, if an interpretive rule is treated as a legislative rule only because it is issued after notice and comment proceedings, then an agency action that is interpretive could be legally binding and subject to a limited review by the court.

In the original APA, the consequences of agency actions were inherently related to the classification of the action as interpretive or legislative. The new language in the proposed interpretive rule exemption does not indicate that Congress intended this amendment to create such radical changes in the treatment of interpretive rules.[104]

IV. Analysis for Classifying an Interpretive Rule

Under the definitional approach, a party's claim that an exempted rule is void because proper rule making procedures were not followed is a direct challenge to the classification of the rule itself. In determining whether the interpretive rule exemption is applicable, the court must consider whether the rule is interpretive or legislative. To make this determination properly, the court must look to the inherent characteristics of the rule.

Before the APA, legislative and interpretive rules were distinguished on the basis of the delegated authority of the agency.[105] When agencies were first created, they had the authority to administer the statute.[106] However, agencies had no inherent power to make law through their rules and regulations, because law-making

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[103]*See* Committee Report, *supra* note 5, at 27; Treatise, *supra* note 12, §§ 7:8, 7:11, 7:13.

[104]*Compare* 5 U.S.C. §§ 551-559 (1976) *with* Regulatory Reform Act, *supra* note 16 *and* Regulatory Procedure Act, *supra* note 16. The proposed Regulatory Reform Act does not contain any provisions that would alter the scope of review or the legal effect of an interpretive rule under the original APA.

[105]*See* Lee, *supra* note 22.

[106]*Id.* at 1-3.

power is a function that belongs to a legislative body.[107] When Congress began delegating law-making power to agencies, a distinction arose between the regulations the agency issued under this statutorily delegated legislative power, and the regulations that were issued by the agencies under their general powers to administer the statutory law.[108] When an agency exercised its delegated legislative power to make law through rules, the rule was legislative with the force and effect of law.[109] When an agency action merely sought to construe the terms of a statute, the rule was interpretive and had no legally binding force or authority.[110]

When Congress passed the APA, these concepts regarding interpretive rules and legislative rules were incorporated into the rule making provisions.[111] According to the legislative history of the APA, notice and comment proceedings were for substantive rules that resulted from the agency's exercise of legislative powers.[112] The exemption from notice and comment was for rules issued under the agency's general administrative power which merely clarified the language of the statute.[113]

Thus, upon careful review of the historical distinctions between these rules, two distinguishing characteristics are discernable: the authority exercised by the agency when it issues the rule and the substantive impact of the rule on the regulated party.

The courts have had a difficult time utilizing these inherent characteristics to classify rules. The substantial impact test, relied upon by some courts, is inadequate for determining the proper classification of a rule. This test does set out useful criteria for determining the impact of the agency action on the regulated party.[114] However, by focusing only on impact, those courts fail to consider the other characteristic of a rule—the source of the agency's authority for its promulgation.

The legal effect test also fails to provide an adequate standard for classifying a rule as interpretive. Courts relying on this test consider only whether the agency action has any legal effect upon the

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[107]Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1672 (1975).

[108]*See* TREATISE, *supra* note 12, §§ 7:8, 7:9.

[109]Lee, *supra* note 22, at 3.

[110]*Id.*

[111]The language in the Attorney General's Committee Report and the Attorney General's Manual is very similar to the language in Lee's 1940 law review article. *Compare* COMMITTEE REPORT, *supra* note 5, at 27, 99-100 *and* ATT'Y GEN'S MANUAL, *supra* note 27, at 30 n.3 *with* Lee, *supra* note 22, at 3.

[112]*See* ATT'Y GEN'S MANUAL, *supra* note 27, at 30 n.3.

[113]*Id.*

[114]*See* notes 37-52 *supra* and accompanying text.

regulated party and the courts.[115] The legal effect of an agency action, however, is distinct from the characteristic impact of the agency's action. The legal effect of a rule is the independent force that allows the agency action to be enforced as a binding rule of law by the agency or the courts.[116] This legally binding force is not an inherent characteristic of any agency action; it is a *consequence* that flows only from a rule that has been properly classified as legislative and issued according to notice and comment proceedings.[117] Thus, an agency action cannot have any legally binding effect *until* it is determined to be a valid legislative rule.[118]

Courts that apply the legal effect standard and follow the reasoning set forth in *Gibson Wine*[119] are caught in an analytical circle. If an agency labels a rule as interpretive and does not hold notice and comment proceedings, then the court applying the legal effect test would find that the rule had no legal effect; if the rule had no legal effect, then the court would concur in the agency's interpretive label. As a result, this method of analysis never steps beyond the consequence of the rule's legal effect to consider the distinguishing characteristics of an agency action.

Because the current methods of analysis are inadequate in classifying a rule as interpretive, this Note proposes a two-step process for classifying an agency action that considers the source of the agency's authority and the impact of the agency's action. In suggesting this approach, this Note recognizes that to encourage agencies to disclose their policies, the impact of the agency action must be measured with a scale that is sensitive both to the interests of the regulated parties and to the purpose of the interpretive rule exemption.

A. Source of Authority

To determine whether an agency is acting with legislative authority in issuing a rule, it must first be ascertained that the agency has been delegated legislative authority. Because of the perceived benefits from notice and comment proceedings, courts have been eager to find delegated legislative authority.[120] Therefore, most

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[115]*See* notes 26-36 *supra* and accompanying text.

[116]*See* COMMITTEE REPORT, *supra* note 5, at 27; ATT'Y GEN'S MANUAL, *supra* note 27, at 30 n.3.

[117]*See* COMMITTEE REPORT, *supra* note 5, at 27; TREATISE, *supra* note 12, §§ 7:8, 7:11, 7:13.

[118]*See* COMMITTEE REPORT, *supra* note 5, at 99-100; Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1152-54 n.26 (D.C. Cir. 1977); *see generally* TREATISE, *supra* note 12, § 7:8.

[119]*See* notes 26-36 *supra* and accompanying text.

[120]*See, e.g.*, Chamber of Commerce of the United States v. OSHA, 636 F.2d 464

courts will not require specific language granting authority to issue legislative rules[121] but will construe the relevant statutory language as granting legislative authority to the agency.[122] The Supreme Court in *Chrysler Corporation v. Brown* found that legislative authority exists if "the reviewing court [may] reasonably be able to conclude that the grant of authority contemplates the regulations issued."[123] This liberal standard allows a court to find legislative authority in most general statutory language unless legislative authority is explicitly denied.

Certain agencies do not have the power to issue legislative rules because they have not been delegated rule making power.[124] In *General Electric Co. v. Gilbert*,[125] the Supreme Court interpreted the authoritative weight of a 1972 guideline issued by the Equal Employment Opportunity Commission (EEOC) and relied upon by a group of employees claiming discrimination under General Electric's disability plan. The Court first looked to the legislative authority of the EEOC and found that Congress had never conferred legislative authority upon the EEOC to issue rules and regulations.[126] The Court concluded that the agency's action could only be interpretive; therefore, no further inquiry was necessary to classify the EEOC guideline.[127]

In reviewing agency actions, courts which focus only on the impact of the rule have failed to consider the source of the agency's authority. In 1974, the Court of Appeals for the District of Columbia

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(D.C. Cir. 1980); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). *See also* SEC v. Chenery Corp., 332 U.S. 194 (1947).

[121]*See, e.g.*, Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 653 (1973) (that the agency's power to determine "new drug" status in its own administrative proceedings was implicit in the regulatory scheme though "not spelled out *in haec verba*"); CIBA Corp. v. Weinberger, 412 U.S. 640, 643 (1973) (the construction was powerfully influenced by the recognition that a different view would seriously impair FDA's ability to discharge the responsibilities placed on it by Congress); CIBA-Geigy Corp. v. Richardson, 446 F.2d 466, 468 (2d Cir. 1971) (in finding that the agency has the power to issue legislative rules, the court observed that "the particularization of a statute by rule-making is not only acceptable in lieu of protracted piecemeal litigation . . . but it is the preferred procedure").

[122]*See, e.g.*, FTC v. Dean Foods Co., 384 U.S. 597 (1966); FPC v. Texaco, Inc., 377 U.S. 33 (1964); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966).

[123]441 U.S. at 308.

[124]An example of an agency that has no express or implied legislative power is the Equal Employment Opportunity Commission (EEOC). The rules issued by the EEOC are only of an advisory nature and are not legally binding. 42 U.S.C. § 2000e-12.

[125]429 U.S. 125 (1976).

[126]*Id.* at 140-46.

[127]*Id.*

reviewed a regulation adopted without notice and comment by the parole board in *Pickus v. United States Board of Parole*.[128] In *Pickus*, a prisoner objected to the parole board regulation, claiming that the rule, which set forth certain factors for determining parole eligibility, had a substantial impact upon his parole determination. The court held that the impact of the regulation was substantial, and thus notice and comment proceedings were required.[129] The agency's action, however, could not be legislative because the parole board had no delegated authority to issue legislative rules.[130]

The *Pickus* case illustrates the importance of the initial determination regarding the source of the agency's rule making authority. The lack of legislative authority, however, is the exception to the general rule that agencies have the authority to issue both legislative and interpretive rules.[131] Thus, the source of an agency's authority for issuing a rule is an essential, but generally nondeterminative, characteristic of interpretive or legislative rules.[132]

If an agency has legislative authority, the next step in defining a rule as interpretive or legislative is to determine whether the agency intended to promulgate the rule pursuant to that legislative authority. This is accomplished by measuring the effect of the agency's action on the affected party's legal and practical interests.

B. Impact of Agency Action

1. Impact on Legal Interests.—Notice and comment proceedings are intended to protect the regulated party from the arbitrary actions of the unrepresentative agencies.[133] This protection is necessary whenever agencies issue "regulations which in form or effect are like the statutes of Congress."[134] An agency action which affects a party's legal interests is "in form or effect" like the laws promulgated by Congress.[135] Furthermore, such agency action creates the type of effect Congress considered to be characteristic of a legis-

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[128]507 F.2d 1107 (D.C. Cir. 1974).

[129]*Id.*

[130]This decision has been criticized for the court's failure to consider the rule making power of the agency. *See* TREATISE, *supra* note 12, § 7; Asimow, *supra* note 23.

[131]*See* notes 120-22 *supra* and accompanying text.

[132]*See* Davis, *supra* note 22. Davis recognized that distinguishing interpretive rules on the basis of the delegation of authority is "weak in the borderland." *Id.* at 928.

[133]*See* S. REP. No. 752, 79th Cong., 1st Sess. 12-13 (1945); H.R. REP. No. 1980, 79th Cong., 2d Sess. 21-23 (1946).

[134]*See* Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 686-87 (9th Cir. 1949) ("[t]he definitions of 'Rule' or 'Rule-making' apply whenever agencies *are exercising legislative functions and powers*, i.e., when issuing general or particular regulations which in form or effect are like the statutes of Congress").

[135]*See* COMMITTEE REPORT, *supra* note 5, at 100-03.

lative rule.[136] If an agency action affects the party's legal interests, that impact is indicative of the agency's intent to act in its legislative capacity and to issue a legislative rule. Thus, agency action that affects the legal interests of the regulated party produces a substantial impact.

To apply this measuring test for impact, it must be determined whether the agency action affects legal interests. It seems clear that whenever an agency implements a statute and creates a new duty for the regulated party, it affects the party's legal interests.[137] However, the majority of courts which apply the interpretive rule exemption, quite understandably have had a difficult time determining whether the rule creates a new duty or simply alters an existing duty.

The courts following the substantial impact test have been more concerned with the degree of impact than with the interests affected by the rule.[138] In *National Motor Freight Traffic Association*,[139] the court did not consider whether the optional, voluntary procedure to settle overcharges created a new duty for shippers and carriers. Regardless of the interests affected, the court concluded that "the Commission took a significant step" which required notice and comment proceedings.[140] The appellate court in *Lewis-Mota*[141] overruled the lower court's finding that the agency action did not affect a party's legal interests.[142] It is unclear from the appellate court's opinion, however, whether the court rejected the district court's conclusion because the agency action did create a new obligation or duty, or whether the appellate court accepted the district court's finding but required notice and comment due to the substantial impact of the rule on practical interests.[143]

The courts applying a legal effect standard have also had difficulty determining whether agency action creates a new duty that affects a party's legal interest. An erroneous conclusion that the rule has no legally binding effect precludes the court's analysis of the interests affected by the agency action.[144] In the recent decision

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[136]*See id.*

[137]*See generally* TREATISE, *supra* note 12, § 7:8.

[138]*See, e.g.*, Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

[139]268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

[140]*Id.* at 97.

[141]469 F.2d 478 (2d Cir. 1972).

[142]*Id.* at 482.

[143]Compare the district court's opinion at 337 F. Supp. 1289 (S.D.N.Y. 1972) with that of the court of appeals at 469 F.2d 478 (2d Cir. 1972).

[144]*See* notes 115-19 *supra* and accompanying text.

of *Chemical Specialties Manufacturers Association v. EPA*,[145] the court was explicit in explaining its evasion of this issue. In reviewing a rule that required pesticide companies to provide certain information on EPA-approved pesticides, the court found that the rule did not create any new substantive obligations because it had "no independent legal effect."[146]

Although most cases following the legal effect test or a substantial impact analysis do not properly consider this criterion, in two recent cases the Court of Appeals for the District of Columbia has set out certain guidelines to distinguish when an agency action creates a new duty and when an agency action is truly an interpretation of an existing duty. In *Citizens to Save Spencer County v. EPA*,[147] the court reviewed rules issued by the EPA that sought to reconcile inconsistent provisions of the Clean Air Act and found that the rules created new rights and obligations.[148] The court found that the agency action created law because the result of the agency action "by no stretch of the imagination could have been derived by mere 'interpretation' of the instructions of Congress."[149] The next year, the court emphasized this test in *Chamber of Commerce of the United States v. OSHA*[150] when it found that an OSHA requirement for employees' walkaround pay created a new duty. The court reviewed the statutory language regarding employee compensation for time spent with OSHA inspectors and found that it neither prohibited nor compelled walkaround pay.[151] Thus, the court concluded that the agency action must be more than an effect on an existing duty.[152] When Congress has not "legislated and indicated its will" on the issue, then the agency action creates a new duty by implementing the statute.[153]

2. Impact on Practical Interests.—If an agency's interpretation of the statutory language creates no new duties and does not affect a party's legal interests, it may nonetheless affect a party's practical interests by altering a party's existing rights and obligations.[154] When measuring the impact of the agency action, many courts have

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[145]484 F. Supp. 513 (D.D.C. 1980).

[146]*Id.* at 519.

[147]600 F.2d 844 (D.C. Cir. 1979).

[148]*Id.* at 879.

[149]*Id.*

[150]636 F.2d 464 (D.C. Cir. 1980).

[151]*Id.* at 469.

[152]*Id.*

[153]*Id.*

[154]*See* COMMITTEE REPORT, *supra* note 5, at 27, 99-100; ATT'Y GEN'S MANUAL, *supra* note 27, at 30.

ignored this practical effect on the regulated party's interests;[155] if a rule did not create a new duty, the impact was not sufficient to require notice and comment proceedings.[156] The intent of Congress, however, was to require notice and comment when rules which interpreted statutes had a substantial impact.[157] This is evident from the original APA definition which includes an agency action that "interprets" as a rule subject to notice and comment proceedings.[158] This intent is also evident in the proposed amendments to the APA which require notice and comment proceedings for rules that have a substantial impact on a party's practical interests.[159]

To determine whether an agency interpretation has a substantial impact on a party's practical interests, the agency action must have a significant, demonstrable effect on the regulated party as a result of a dramatic change in the agency's practices or policies. It is the dramatic change in the agency's established policy that indicates that the agency intends to act in its legislative capacity. Moreover, the significant effect of a dramatic change in the agency's established policy is the type of agency action that Congress intended to be subject to notice and comment proceedings.

The cause of the practical impact must be precisely the agency's departure from established policy. When the change is not caused by the agency action, the impact of the agency action itself is not substantial enough for the rule to be considered legislative and subject to notice and comment proceedings.[160] An example of this situation would be where Congress issues a new statute and an agency issues a contemporaneous interpretation of the new statute that had some significant conjoint effect. If such an interpretation creates any significant impact, the proximate cause of the impact is not the agency but Congress itself. Therefore, the agency's action is not a result of a dramatic change in its position and there is no indication that the agency is acting beyond its general powers to interpret statutory language.

A dramatic change in the agency's policy has traditionally been

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[155]*See, e.g.*, Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952); Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970).

[156]*See* British Caledonian Airways, Ltd. v. CAB, 584 F.2d 982, 989 (D.C. Cir. 1978) (for a rule to have the requisite substantial impact, it must have created new rights and obligations); American President Lines, Ltd. v. Federal Maritime Comm'n, 316 F.2d 419, 422 (D.C. Cir. 1963) (regardless of the practical effect of the rule, if it is only an interpretation, it does not have a substantial impact).

[157]*See* notes 88-96 *supra* and accompanying text.

[158]5 U.S.C. § 551(4) (1976).

[159]*See* Regulatory Reform Act, *supra* note 16, § 553(b)(1)(C); Regulatory Procedure Act, *supra* note 16, § 553(a)(3).

[160]*See* TREATISE, *supra* note 12, § 7:14.

considered a factor that will trigger the protective function for rule making.[161] In *Chamber of Commerce*, the court stated that "[c]harting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation."[162] The need for notice and comment proceedings when a dramatic change occurs was emphasized in the Senate Report accompanying the proposed amendments to the APA. The Report found that "rule making . . . is appropriate when an agency changes its past practice."[163]

To determine whether a dramatic change has occurred, the prior position of the agency must be examined. A dramatic change does not occur if the interpretation makes clear the agency's position on a statute or agency policy that was, within narrow limits, ambiguous, inconsistent, or in need of clarification. A Revenue Ruling illustrates the type of agency policy that is generally ambiguous and in need of clarification. Revenue Rulings are considered to be "merely the opinion of a lawyer in the agency" on specific questions regarding the tax laws.[164] Parties affected by a Revenue Ruling are not to rely upon the Ruling but to accept it only as the agency's interpretation which is subject to change.[165] Therefore, if an agency re-interprets its position on a policy, the change is generally not considered to be dramatic, despite its degree of departure. Under certain circumstances, however, a Revenue Ruling may become so firmly established over a period of time that it is no longer considered ambiguous or unreliable.[166] In that instance, if the IRS were to change its position, the result could be a dramatic change.[167]

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[161]*See* Lee, *supra* note 22, at 1-4; Davis, *supra* note 22.

[162]636 F.2d at 470.

[163]SENATE REPORT, *supra* note 1, at 112.

[164]Stubbs, Overbeck & Assoc. v. United States, 445 F.2d 1142, 1146-47 (5th Cir. 1971).

[165]*See* Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941); Krane, Levin & Javaras, *Public Hearings for Private Rulings: A Dissent*, 50 TAXES 160 (1972); Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756 (1965); Comment, *Revenue Rulings and the Federal Administrative Procedure Act*, 1975 WIS. L. REV. 1135 (1976). Generally, the agency will issue a Revenue Ruling when it finds there are many requests for a letter ruling on similar areas of the tax law and therefore the agency's action interprets the statute. Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756 (1965).

[166]*See* Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1291 (D. C. Cir. 1974) (Wright, J., dissenting). *See also* note 79 *supra*.

[167]*See* SENATE REPORT, *supra* note 1, at 113. "It is conceivable that a rule, of a type usually considered interpretive, may in certain circumstances have the kind of substantial impact on rights or obligations which remove it from the ambit of this modified exemption for interpretive rules." *Id.*

When the agency's well-established position is changed, the interests of those who have complied with the old policy as well as those who must comply with the new policy must be considered in determining whether a dramatic change has occurred. In *Burroughs Wellcome Co. v. Schweiker*,[168] a recent Fourth Circuit case, the court of appeals reviewed a challenge to an FDA regulation that allowed a new drug applicant to demonstrate the drug's safety and effectiveness with scientific literature compiled by manufacturers of previously approved and marketed drugs. In determining that the change was not dramatic, the court considered the impact of the agency action on only future applicants.[169] The court failed to consider the effect of this change on the competitive position of past applicants who had published scientific material on approved drugs because of their reliance on the past method that required each applicant to do its own scientific research.[170]

In addition to creating a dramatic change in a party's practical interests, an agency interpretation must have a demonstrable effect on the regulated parties to create a substantial impact. How to measure the effect of an agency's action on a party's practical interests is difficult to determine because, as the Senate Report notes, "[a]ctual impact obviously varies from case to case."[171] However, certain boundaries premised on the purpose of the exemption have been established by case law.

The impact of a rule that necessitates notice and comment proceedings must not be so great that adversely affected parties are left with no protection from agency action. The Court of Appeals for the District of Columbia noted in *Chamber of Commerce of the United States v. OSHA*, that the rule making requirements of the APA should not be treated as meaningless ritual because rule making procedures "as a practical matter, may constitute an affected party's only defense mechanism."[172] On the other hand, the impact of an interpretive rule should not be restricted to the effect of "an internal agency housekeeping arrangement."[173]

The balance achieved by an optimal test must not only serve the public's needs but also be sensitive to the agency's situation. In *Batterton v. Marshall*,[174] a recent District of Columbia Circuit case, the Department of Labor claimed that if the impact of any routine agen-

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[168]649 F.2d 221 (4th Cir. 1981).

[169]*Id.* at 224-25.

[170]*Id.*

[171]SENATE REPORT, *supra* note 1, at 113.

[172]636 F.2d 464, 470 (D.C. Cir. 1980).

[173]Energy Consumers v. Department of Energy, 632 F.2d 129, 139 (Temp. Emer. Ct. App. 1980).

[174]648 F.2d 694 (D.C. Cir. 1980).

cy correction or refinement of agency technique were sufficient to require notice and comment proceedings, the burden on the agencies would be overwhelming.[175] Thus, to achieve a proper balance between these conflicting needs, the scale must be able to determine when the impact of a rule on a party's practical interests is substantial enough to require notice and comment proceedings; yet, the test should not destroy the incentive to disclose agency opinions by requiring notice and comment for every agency action.

Although the degree of impact that amounts to a significant effect will always vary, some of the factors that should be considered in measuring the impact of an agency's interpretation can be isolated. One factor is the agency's treatment of the rule. While the label the agency gives a rule is not dispositive in classifying a rule, it does indicate what type of rule the agency intended to issue.[176] Other agency actions may give more concrete indications of the effect the agency intended the rule to have on the regulated parties. For example, if the agency enforces the rule by withholding a benefit or imposing a penalty on the regulated party, that would indicate that the agency intended to issue a rule with the consequences of a legislative rule.[177]

Another factor to be considered is the competitive pressure to comply with the agency ruling. As agency regulations pervade the marketplace and the cost of litigation continues to climb, many affected parties may not be able to afford to resist compliance. In addition to the pressure to comply, the cost of compliance should be considered. This cost may not always be monetary because of the variety of agencies and the diverse areas of regulation. In *Joseph v. United States Civil Service Commission*,[178] the Court of Appeals for the District of Columbia considered the cost to federal employees of nonparticipation in partisan elections caused by a Civil Service rule that excluded those federal employees from an exemption to the Hatch Act.[179] The cost of the agency action may not be explicit, but whatever cost is imposed on affected parties should be considered in determining whether the agency action has a substantial impact.

There are certain factors that many courts have weighed in an erroneous assessment of the impact created by an agency's interpretation.[180] The most prominent error is to look to the legal effect

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[175]*Id.* at 710 n.91 (citing Brief for Appellee at 28).

[176]*See Chamber of Commerce*, 636 F.2d at 468.

[177]*See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 312-16 (1979); Morton v. Ruiz, 415 U.S. 199 (1974).

[178]554 F.2d 1140 (D.C. Cir. 1977).

[179]*Id.* at 1152-53.

[180]*See, e.g., Chemical Specialties Mfrs. Ass'n*, 484 F. Supp. 513 (considering the

of a rule as an indication of the impact of the agency action.[181] The legal effect of a rule is a consequence of a rule that only follows after the classification has been made.[182] Therefore, if a court weighs the legal effect when determining the impact of the agency action, the court is only considering the consequence of a valid legislative rule and not reaching the primary question of the characteristic of the rule.

Another error in analysis, resulting from the confusion of characteristics with consequences, occurs when the court considers the weight given the rule in adjudicatory proceedings. A legislative rule is traditionally accorded the same deference as a statute,[183] while an interpretive rule is given certain weight as authority but is not considered binding on the court.[184] With the difficulty in distinguishing an interpretive rule from a legislative rule, some courts have given the same deference to interpretive rules as to legislative rules.[185] As a result, certain courts see this trend as giving interpretive rules a certain "legal effect" and creating a need for notice and comment proceedings.[186] This conclusion, like the legal effect test, is erroneous because the weight a court should give a rule can be measured only after a court determines whether the rule is interpretive or legislative.

V. CONCLUSION

The proposed amendments to the interpretive rule exemption offer an opportunity to reevaluate this exemption and to clear the confusion that has existed since the creation of the interpretive rule exemption. This Note advocates a definitional approach to the application of the exemption. To achieve a definitional application, this Note proposes a series of analytical steps based on the two fun-

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correctness of the agency's interpretation rather than the impact of the rule); *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (looking to the legal effect as the impact of the rule).

[181] *See* notes 115-19 *supra* and accompanying text.

[182] *See id.*

[183] *See* COMMITTEE REPORT, *supra* note 5, at 99-100.

[184] *Id.* The weight to be given an interpretive rule was set out in the leading case of Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The Court in *Skidmore* held that the weight to be given to the agency's interpretive rule will depend upon the thoroughness of the agency's consideration of the issues, the validity of the agency's reasoning, the consistency of the results with prior and subsequent pronouncements, and other factors which make the agency's opinion persuasive, even if not controlling. *Id.*

[185] *See* Asimow, *supra* note 23, at 561-64.

[186] *See, e.g.*, American Bancorporation v. Federal Reserve System, 509 F.2d 29 (8th Cir. 1974); Shell Oil Co. v. FPC, 491 F.2d 82 (5th Cir. 1974); Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952).

damental distinctions between an interpretive rule and a legislative rule: the source of the agency's authority in issuing the rule, and the impact of the rule on the party's interests. Following the proposed analysis will result in the classification of an agency action as an interpretive rule or as a legislative rule. Once this classification is made, the interpretive rule exemption is then applied to those rules which are defined as interpretive. The definitional approach outlined in this Note would create a stable atmosphere for the application of the interpretive rule exemption and achieve the purposes for the creation of the interpretive rule exemption.

Because the ambiguity in a statute is often disproportionately related to the confusion it may cause, it is also advisable that the proposed amendment to the interpretive rule exemption be further clarified by including a definition for interpretive rule under section 551 of the APA. An interpretive rule could be defined as "an agency interpretation, promulgated under the agency's general powers, which does not create legal rights or substantially alter the existing rights or obligations of persons outside the agency." This language could more clearly convey the congressional intent to require notice and comment proceedings for agency action that has a substantial impact, yet to exempt agency action that is actually interpretive. Furthermore, it would provide a clear guideline to the agencies and courts in determining when the exemption from notice and comment proceedings is available for interpretations issued by the agencies.

ANNE SLAUGHTER

Physician Liability for Failure to Resuscitate Terminally Ill Patients

I. INTRODUCTION

Modern medical technology has made tremendous strides over the last few decades. Medical science is now capable of sustaining organic life in situations where death would certainly occur without application of available technology.[1] Although these advances have saved many lives, they have also created awesome problems for the physicians and other health care professionals attending the terminally ill, hospitalized patient.[2] In treating the terminally ill, the physician may have an extensive spectrum of treatment options available, treatment offering no hope of a cure, but only serving to prolong the dying process.[3] Thus, the physician is forced to choose among treatments that are not therapeutic, but which will affect the time and mode of dying.[4]

The changing definition of death over the past decade further complicates the physician's dilemma. For centuries a heartbeat and respirations distinguished life from death.[5] Today, however, the trend is toward redefining death as the irreversible loss of brain function.[6] The issues of "brain death," "the right to die," and "who pulls the plug" had generated controversy in both the medical and legal professions before *In re Quinlan*.[7] That decision, however, triggered a re-examination of the concept of death. In addition, it raised questions concerning the responsibilities of physicians in caring for the competent dying patient, and the patient who is incompetent be-

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[1]Teel, *The Physician's Dilemma—A Doctor's View: What the Law Should Be*, 27 BAYLOR L. REV. 6, 6 (1975).

[2]While exact figures are not available, it is estimated that 80% of all deaths in the United States occur in hospitals or nursing homes. Annas, *Rights of the Terminally Ill Patient*, 1974 J. NURSING AD. 40, 40 (Mar.-Apr. 1974). There is no precise medical or legal definition of a terminal disease. In common usage, such a condition is one without cure and which will result in death, whether life-prolonging therapy is administered or not. Note, *No-Code Orders vs. Resuscitation: The Decision to Withhold Life-Prolonging Treatment from the Terminally Ill*, 26 WAYNE L. REV. 139, 140 n.6 (1979).

[3]Morison, *Dying*, 229 SCIENTIFIC AM. 55, 55 (Sept. 1973).

[4]Grenvik, Powner, Snyder, Jatremski, Babcock & Loughhead, *Cessation of Therapy in Terminal Illness and Brain Death*, 6 CRITICAL CARE MED. 284, 284 (1978).

[5]BLACK'S LAW DICTIONARY 488 (4th ed. 1968). *See also* Smith v. Smith, 229 Ark. 579, 317 S.W.2d 275 (1958); Thomas v. Anderson, 96 Cal. App. 2d 371, 215 P.2d 478 (1950); Schmitt v. Pierce, 344 S.W.2d 120 (Mo. 1961).

[6]*See* Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J. A.M.A. 337 (1968).

[7]*See* 137 N.J. Super. 227, 348 A.2d 801 (Ch. Div. 1975), *rev'd*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

cause of coma, medication, mental retardation, etc., and therefore incapable of expressing his wishes concerning his medical care.

Although our society permits a competent terminally ill patient to refuse life-saving or life-prolonging treatment,[8] our system of law generally does not authorize one person to make life and death decisions for another.[9] Yet, the physician who treats an incompetent terminally ill patient must constantly evaluate whether "continued maximal efforts constitute a reasonable attempt at prolonging life, or whether the patient's illness has reached a stage where further intensive care is, in fact, merely postponing death."[10] This dilemma is present and must be addressed when a physician decides whether to administer cardiopulmonary resuscitation to such a patient.

This Note will explore when the decision to withhold cardiopulmonary resuscitation (CPR)[11] from competent and incompetent terminally ill patients is legally permissible. In making this determination, this Note will focus on the various factors that must be considered, including when CPR is extraordinary treatment and how the decision may be affected by the brain death definition of death.

II. Changing Definitions of Death

A. *Traditional Definition of Death*

Until recently, death was considered a simple occurrence, "defined by physicians as the total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc."[12] The courts fully accepted this definition of death,[13] and indeed had no choice, because physicians were incapable of re-establishing the function of the heart and lungs after activity ceased.[14] While the moment of death has legal significance in various types of cases including homicide, taxation, inheritance, pro-

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[8]Ufford, *Brain Death/Termination of Heroic Efforts to Save Life—Who Decides?*, 19 Washburn L.J. 225, 225 (1980).

[9]Note, *supra* note 2, at 140.

[10]Clinical Care Committee of the Massachusetts General Hospital, *Optimum Care for Hopelessly Ill Patients*, 295 New Eng. J. Med. 362, 362 (1976).

[11]*See* notes 41-56 *infra* and accompanying text.

[12]Black's Law Dictionary 488 (4th ed. 1968).

[13]*See* Smith v. Smith, 229 Ark. 579, 317 S.W.2d 275 (1958); Estate of Schmidt, 261 Cal. App. 2d 262, 67 Cal. Rptr. 847 (1968); Sauers v. Stolz, 121 Colo. 456, 218 P.2d 741 (1950); *In re* Davenport's Estates, 79 Idaho 548, 323 P.2d 611 (1958); Prudential Ins. Co. v. Spain, 339 Ill. App. 476, 90 N.E.2d 256 (1950); United Trust Co. v. Ryke, 199 Kan. 1, 427 P.2d 67 (1967); Gray v. Sawyer, 247 S.W.2d 496 (Ky. 1952); Vaegemast v. Hess, 203 Minn. 207, 280 N.W. 641 (1938); Finch v. Edwards, 239 Mo. App. 788, 198 S.W.2d 665 (1946); Evans v. New York, 49 N.Y. 86 (1872); Evans v. Halterman, 31 Ohio App. 175, 165 N.E. 869 (1928); Glover v. Davis, 366 S.W.2d 227 (Tex. 1963).

[14]*See* Corday, *Life-Death in Human Transplantation*, 55 A.B.A. J. 629, 630 (1969).

perty rights, insurance claims, wrongful death, and transplantation,[15] the law does not ordinarily attempt to define death.[16] Generally, the courts rely upon the expert testimony of physicians to determine the fact and time of death.[17]

Until recently, the few modern court decisions involving a definition of death used the concept of the total cessation of all vital signs.[18] In doing so, the courts made the assumption that the medical criteria for determining death were settled and agreed upon by physicians.[19] In *Thomas v. Anderson*,[20] decided in 1950, the California Court of Appeals held that "death occurs precisely when life ceases and does not occur until the heart stops beating and respirations end. Death is not a continuous event and is an event that takes place at a precise time."[21]

Unfortunately, this traditional definition of death has the potential for ludicrous results. In *Gray v. Sawyer*,[22] a husband and wife were killed by a train at a railroad crossing. The husband's body was horribly mutilated and the wife was decapitated, but a witness to the accident observed blood spurting from the neck of the wife's body.[23] In an action to determine survivorship, doctors applying the traditional definition of death testified that "a body is not dead so long as there is a heartbeat, and that may be evidenced by the gushing of blood in spurts."[24]

Another problem with the traditional definition of death is that technological advances have outmoded it.[25] Cardiopulmonary resuscitation is capable of returning to life individuals who fulfill the traditional criteria for death.[26] Respirators, dialysis equipment,

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[15]Ufford, *supra* note 8, at 227.

[16]Corday, *supra* note 14, at 630.

[17]*Id.*

[18]*See* Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *supra* note 6, at 338.

[19]*See id.*

[20]96 Cal. App. 2d. 371, 215 P.2d 478 (1950).

[21]*Id.* at 376, 215 P.2d at 482.

[22]247 S.W.2d 496 (Ky. 1952).

[23]*Id.* at 497.

[24]*Id.* The appellate court upheld the trial court's decision that the couple died simultaneously because the witness' testimony was not presented in the trial court. Without that testimony there was no evidence as to which individual died first; therefore, the deaths were held to be simultaneous. *Id.* at 498. It is likely the court would have ruled otherwise had the witness' testimony been available.

[25]Ufford, *supra* note 8, at 226.

[26]Beecher, *Ethical Problems Created by the Hopelessly Ill Patient*, 278 NEW ENG. J. MED. 1425, 1426 (1968). *See* Beck, Weckesser & Barry, *Fatal Heart Attack and Successful Defibrillation*, 161 J. A.M.A. 434 (1956). This was the first published case of a successful resuscitation outside an operating room. Today, cardiopulmonary resuscitation is commonplace.

pacemakers, and organ transplantation are capable of prolonging lives which previously would have ended much earlier.[27]

B. Modern Concept of Death

Technological advances resulting in indefinite prolongation of life in the traditional sense, that is, the presence of cardiac and respiratory functions, have prompted the medical profession to develop a definition of human death that includes brain death as a criterion.[28] Brain death generally describes permanent cessation of all brain functions.[29] Because the brain and its stem control vital activities such as heartbeat and respiration, cessation of these vital somatic functions invariably follows cessation of brain function unless cardiac and respiratory functions are supported mechanically.[30] Brain death is distinct from chronic vegetative states, wherein the individual has lost the cognitive qualities of self-awareness and the ability to communicate and interact with others, but certain vital functions such as respiration, temperature, and blood pressure are retained because the brain stem is intact.[31] Such individuals are brain damaged, but they are not brain dead.

In 1968, the Ad Hoc Committee of the Harvard Medical School set forth clinical criteria to establish brain death.[32] A person who is brain dead is in a deep coma marked by unresponsiveness to painful, externally applied stimuli, lack of spontaneous movement and respiration, and lack of reflexes, including blink, light, cough and tendon reflexes.[33] While various organizations, medical schools, and

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[27]Ufford, *supra* note 8, at 226.

[28]*See* Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *supra* note 6.

[29]Irreversible coma can have various causes including cardiac arrest, asphyxia with respiratory arrest, massive brain damage secondary to trauma, and both neoplastic and vascular intracranial lesions. *Id.* at 339.

[30]National Institute of Neurological and Communicative Disorders and Stroke, *An Appraisal of the Criteria of Cerebral Death: A Summary Statement*, 237 J. A.M.A. 982, 984 (1977).

[31]Such was the condition of Karen Ann Quinlan. *See In re* Quinlan, 70 N.J. 10, 24, 355 A.2d 647, 654, *cert. denied*, 429 U.S. 922 (1976).

[32]Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *supra* note 6.

[33]*Id.* at 337-38. The Harvard Criteria denote a flat or isoelectric electroencephalogram (EEG) to be of great confirmatory value, but other medical experts caution against placing too much emphasis on EEG readings alone. One year following the Harvard Report, the Ad Hoc Committee of the American Electroencephalographic Society on EEG Criteria for the Determination of Cerebral Death urged refinement in the use of the EEG in determining death. The Committee was adamant in stating that the EEG should never be used alone to diagnose cerebral death. Ad Hoc Committee of the American Electroencephalographic Society on EEG Criteria for the Determination

hospitals have established their own "brain death guidelines" or protocols, they have incorporated the Harvard Criteria into those guidelines, with refinements.[34]

The virtually universal acceptance of the brain death standard by the medical profession[35] has resulted in concomitant developments in the law. Thirty states, either by statute[36] or judicial decision,[37] have adopted brain death definitions to supplement the traditional standards of death determination. While Arkansas, Montana, and Tennessee articulate only the brain death standard in their definition of death statutes,[38] all the other states adopting the brain death standard have expressly retained the traditional criteria

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of Cerebral Death, *EEG Criteria for the Determination of Cerebral Death*, 209 J. A.M.A. 1505 (1969). Still other medical experts maintain that while helpful, the EEG is neither "necessary nor sufficient in diagnosing brain death." Lovato v. District Ct., 198 Colo. 419, 601 P.2d 1072, 1078 (1979) (quoting the Report of the Ad Hoc Brain Death Committee of the Colorado Association of Clinical Neurologists (Nov. 1978)).

[34]*See* Ufford, *supra* note 8, at 229. Any brain death protocol should be clear and distinct, contain tests which are relatively simple to perform and interpret, contain multiple criteria which are not rigid, be compatable with traditional criteria of death, and recognize that the primary diagnosis of brain death is clinical. *Id.*

[35]*See* Black, *Brain Death, Part I & Part II*, 299 N. ENG. J. MED. 338, 393 (1978); Conway, *Medical and Legal Views of Death: Confrontation and Reconciliation*, 19 ST. LOUIS U.L.J. 172 (1974); National Institute of Neurological and Communicative Disorders and Stroke, *An Appraisal of the Criteria of Cerebral Death: A Summary Statement*, 237 J. A.M.A. 982 (1977); Podgers, *Brain Death Concept Gaining Acceptance*, 66 A.B.A. J. 272 (1980).

[36]1979 Ala. Acts 165; ALASKA STAT. § 09.65.120 (1980); ARK. STAT. ANN. § 82-537 (Supp. 1979); CAL. HEALTH & SAFETY CODE § 7180 (West Supp. 1981); 1979 Conn. Pub. Acts 79-556; GA. CODE § 88-1715.1 (1975); HAWAII REV. STAT. § 327C-1 (Supp. 1980); IDAHO CODE § 54-1819 (Supp. 1981); ILL. REV. STAT. ch. 110½, § 302 (1979); IOWA CODE § 702.8 (1979); KAN. STAT. ANN. § 77-202 (Supp. 1979); LA. CIV. CODE ANN. art. 9:111 (West Supp. 1981); MD. ANN. CODE art. 43, § 54-F (1980); MICH. COMP. LAWS § 333.1021 (1980); MONT. REV. CODES ANN. § 69-7201 (Supp. 1977); 1979 Nev. Stats. 162; N.M. STAT. ANN. § 12-2-4 (1978); N.C. GEN. STAT. § 90-332 (Supp. 1977); OKLA. STAT. tit. 63, § 1-301 (Supp. 1980); OR. REV. STAT. § 146.001 (1979); TENN. CODE ANN. § 53-459 (1977); TEX. REV. CIV. STAT. ANN. art. 4447t (Vernon Supp. 1980); VA. CODE § 54-325.7 (Supp. 1981); W. VA. CODE § 16-19-1 (1979); WYO. STAT. § 35-19-101 (1977).

[37]State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979); Lovato v. District Ct., 198 Colo. 1419, 601 P.2d 1072 (1979); Swafford v. State, 421 N.E.2d 596 (Ind. 1981); Commonwealth v. Golston, 373 Mass. 249, 36 N.E.2d 744 (1977), *cert. denied*, 434 U.S. 1039 (1978); *In re Bowman*, 94 Wash. 2d 407, 617 P.2d 731 (1980).

[38]ARK. STAT. ANN. § 82-537 (Supp. 1981); TENN. CODE ANN. § 53-459 (1977); MONT. REV. CODES ANN. § 69-7201 (Supp. 1977). For example, the Montana statute, section 69-7201, reads as follows: "A human body with irreversible cessation of total brain function, as determined according to usual and customary standards of medical practice, is dead for all legal purposes." But, the recommendation of the National Conference of Commissioners on Uniform State Laws is that "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem is dead. A determination of death must be made in accordance with accepted medical

for death. None of the states and advisory committees which have adopted brain death definitions have specified any criteria for brain death determination;[39] they have reserved this task for the medical profession.[40]

III. CARDIOPULMONARY RESUSCITATION

Cardiopulmonary resuscitation (CPR) is one of the technological advances in modern medical practice which has helped to erode the validity of the traditional criteria of death.[41] Until the 1950's, cardiac arrest was synonymous with death. At that time, Claude Beck startled the medical profession with demonstrations showing that many nonfunctioning hearts sustain only small amounts of damage and can be revived following cardiac arrest.[42] Today CPR encompasses numerous medical procedures when performed in the hospital setting, but the immediate purpose of CPR is to provide effective ventilation and circulation when a patient's heart and lungs have ceased functioning.[43] Rapid restoration of oxygen flow to the

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standards." UNIFORM DETERMINATION OF DEATH ACT. *See also* KAN. STAT. ANN. § 77-202 (Supp. 1981), which provides:

> A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in this event, death will have occurred at the time these functions ceased; or
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> A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before any vital organ is removed for purposes of transplantation.
>
> These alternative definitions of death are to be utilized for all purposes in this state, including the trials of civil and criminal cases, any laws to the contrary notwithstanding.

[39]*See* Swafford v. State, 421 N.E.2d at 601. *See* note 38 *supra.*

[40]*See* Swafford v. State, 421 N.E.2d at 601.

[41]*See* Corday, *supra* note 14; Levin & Levin, *CPR: Its Legal Effects*, 3 GLENDALE L. REV. 285 (1978-79).

[42]Corday, *supra* note 14, at 630.

[43]Hospital resuscitation includes the use of adjunctive equipment such as endotracheal intubation and supplemental oxygen, intravenous fluids and cardiac drugs, defibrillation, insertion of artificial cardiac pacemakers, cardiac monitoring with control of arrythmias, and even open chest internal cardiac compression, if indicated. National Conference on Standards for Cardiopulmonary Resuscitation and Emergency Cardiac

brain is essential to prevent brain damage or brain death. The probability of brain damage after oxygen flow to the brain has ceased depends upon the speed of application of CPR.[44]

Physicians have an obligation to initiate CPR whenever it is medically indicated.[45] The American Medical Association position on CPR is that it is not indicated when death is the expected outcome of a terminal, irreversible illness, or where prolonged cardiac arrest indicates that resuscitation would be futile.[46] Rather, the goal of CPR is to prevent "sudden, unexpected death."[47] Therefore, where death is sudden and unexpected, CPR is ordinary medical care which all physicians have a legal, as well as professional, obligation to render.[48] When death is the natural termination of an irreversible illness, however, there is no professional obligation to initiate CPR. This implies that in this circumstance CPR is extraordinary care, which may be omitted without resultant legal liability.[49]

In accordance with its position on CPR, in 1974, the AMA recommended that when CPR is contraindicated for hospital patients, that physicians document this conclusion both in the patient's progress notes and on the physician's order sheet for the benefit of other health care personnel.[50] This order to withhold CPR has various names, including the "Do Not Resuscitate" (DNR) order,[51] the "No-Code" order,[52] and the "Order Not to Resuscitate" (ONTR).[53]

Recent judicial decisions[54] have prompted various commentators to question what procedure is proper for determining whether a DNR order can be issued.[55] Additionally, concern exists that tradi-

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Care, *Standards for Cardiopulmonary Resuscitation (CPR) and Emergency Cardiac Care (ECC)*, 227 J. A.M.A 837, 838 (1974) [hereinafter cited as *Standards for CPR*].

[44]Corday, *supra* note 14, at 630. If the oxygen flow is reestablished within four minutes, brain damage is unlikely. Levin & Levin, *supra* note 41, at 286-87. If reestablishment of oxygen flow is delayed from four to ten minutes, brain damage is probable. *Id.* Brain damage is almost certain if deprivation of oxygen exceeds ten minutes and may be severe enough to result in brain death. *Id.*; Corday, *supra* note 14, at 630.

[45]*Standards for CPR*, *supra* note 43, at 864.

[46]*Id.*

[47]*Id.*

[48]*See* notes 86-97 *infra* and accompanying text.

[49]*Id.*

[50]*Standards for CPR*, *supra* note 43, at 864.

[51]*See In re* Quinlan, 70 N.J. 10, 29, 355 A.2d 647, 657, *cert. denied*, 429 U.S. 922 (1976).

[52]*See In re* Dinnerstein, 6 Mass. App. Ct. 466, 470, 380 N.E.2d 134, 136 (1978).

[53]Rabkin, Gilkman & Rice, *Orders Not to Resuscitate*, 295 NEW ENG. J. MED. 364 (1976).

[54]*In re* Dinnerstein, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

[55]*See, e.g.*, Baron, *Assuring "Detatched But Passionate Investigation and Decis-*

tional death criteria should not or will not be recognized in the future as a result of the adoption of the brain death standard. Depending upon how the courts delineate ordinary and extraordinary treatment,[56] eliminating traditional death criteria could compel physicians to employ CPR for all patients, regardless of their medical prognosis.

IV. EUTHANASIA BACKGROUND

Whenever withholding available medical resources is contemplated, the issue of euthanasia surfaces. The word "euthanasia" is derived from the Greek word for "easy death," and is defined as "[t]he act or practice of painlessly putting to death persons suffering from incurable and distressing disease as an act of mercy."[57] Euthanasia is a collective concept encompassing three distinct aspects: death with dignity,[58] mercy killing,[59] and death selection.[60]

In the American criminal system, euthanasia is considered to be murder[61] because motive is generally not an element of the crime of murder.[62] This view of euthanasia was discussed in *People v. Conley*.[63] The California Supreme Court, in a discussion of malice aforethought, stated that "one who commits euthanasia bears no ill will toward his victim and believes his act is morally justified, but he nonetheless acts with malice if he is able to comprehend that society prohibits his act regardless of his personal belief."[64]

Courts have held that even if the victim were dying at the time

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ion": The Role of Guardians Ad Litem in Saikewicz-type Cases, 4 AM. J.L. & MED. 111 (1978); Curran, *The Saikewicz Decision*, 298 NEW ENG. J. MED. 499 (1978).

[56]*See* notes 101-36 *infra* and accompanying text.

[57]BLACK'S LAW DICTIONARY 497 (5th ed. 1979).

[58]When used in this sense, euthanasia means letting the terminally ill die without subjecting them to the application of extraordinary medical technology. This is not synonymous with neglect: the dying patient, like all others, is given reasonable and prudent care under the circumstances. St. Martin, *Euthanasia: The Three-In-One Issue*, 27 BAYLOR L. REV. 62, 62 (1975).

[59]This concept encompasses the intentional use of medical technology to induce or hasten death. It includes giving a lethal drug to a terminally ill patient with the express intention of causing death, as well as withdrawing "ordinary, reasonable and prudent care," For example, allowing Downs' Syndrome children to die of pneumonia. The justification for such acts is pity: the lives and, therefore, the suffering of incurably ill or defective persons should not be prolonged. *Id.*

[60]This process involves the deliberate termination of lives which are no longer considered "socially useful," and which have become a burden to society. *Id.* at 62-63.

[61]Note, *Legal Aspects of Euthanasia*, 36 ALBANY L. REV. 674, 675 (1972).

[62]W. LAFAVE & F. SCOTT, HANDBOOK ON CRIMINAL LAW 200, 205 (1972). Motive, or the reason for acting is distinguished from intent. While intent is an essential element of murder, motive is not unless mandated by statute. *Id.*

[63]64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966) (not a euthanasia case).

[64]*Id.* at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822.

the defendant acted, the defendant is still guilty of homicide.[65] "If any life at all is left in the human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being."[66] Therefore, killing to relieve suffering is not a recognized defense to murder. Receiving the consent of the victim is not a recognized defense either.[67] In *People v. Roberts*,[68] a husband, at the request of his wife who was afflicted with multiple sclerosis, mixed poison and placed it within her reach. Though suicide was not a criminal offense in Michigan, and therefore aiding suicide could not be a crime, the defendant was found guilty of first-degree murder.[69]

In theory, euthanasia is homicide, but cases dealing with euthanasia reveal a chasm between the theory and the practice of the law.[70] This was most poignantly illustrated in *People v. Werner*.[71] The sixty-nine-year-old defendant who had suffocated his crippled, bedridden wife upon learning that they were being sent to a nursing home pleaded guilty to voluntary manslaughter.[72] The judge had the defendant withdraw his guilty plea and then acquitted Werner, saying:

> Courts don't condone mercy killings and I do not, but . . . [w]e certainly have no reason to be concerned about his committing any comparable crimes or further crimes . . . . I am inclined to think that a jury, if he were tried with a jury, and testimony was brought out of his devotion and care to his wife in her incurable illness and of her constant pain and suffering, the jury would not be inclined to return a verdict of guilty.[73]

There have been many other instances of failure to indict, acquittals, suspended sentences, and reprieves where the killer was allegedly motivated by mercy.[74] Thus, it seems that motive, although

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[65]W. LAFAVE & F. SCOTT, *supra* note 62, at 532-33.

[66]State v. Francis, 152 S.C. 17, 149 S.E. 348, 364 (1929) (quoting 21 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 92 (2d ed. 1902)).

[67]Gurney, *Is There a Right to Die? A Study of the Law of Euthanasia*, 3 CUM.-SAM. L. REV. 235, 240 (1972).

[68]211 Mich. 187, 178 N.W. 690 (1920).

[69]*Id.* at 188, 178 N.W. at 694.

[70]*See* Morris, *Voluntary Euthanasia*, 45 WASH. L. REV. 239 (1970).

[71]Crim. No. 58-3656 (Cook County Ct., Ill. 1958), *discussed in* Survey, *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations*, 48 NOTRE DAME LAW. 1202, 1214 n.95 (1973). A portion of the transcript of this case is presented in Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 184-87 (1966).

[72]*See* Survey, *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations*, 48 NOTRE DAME LAW. at 1214.

[73]*Id.* at 1215 (citing Williams, *supra* note 71, at 186).

[74]One writer has collected ten euthanasia cases in which the victim did not re-

not a recognized defense to murder at common law, has influenced the decisions of judges and juries in euthanasia cases.[75] Interestingly, only two physicians have ever been indicted for alleged acts of euthanasia and both were found not guilty.[76] Yet a survey conducted at a Chicago medical convention revealed that sixty-one percent of those present believed that passive euthanasia was being practiced by members of the profession.[77] Other physicians believe the estimate to be even higher.[78]

V. Determining Physician Liability for Euthanasia

Euthanasia may not be illegal under all circumstances.[79] In determining whether a physician's actions may give rise to either criminal or civil liability, three distinct factual determinations must be made: 1) whether the death of the patient resulted from an omission or commission; 2) whether the life-saving treatment was of an ordinary or extraordinary nature; and 3) whether the patient died voluntarily or involuntarily.[80]

A. The Active-Passive Distinction

Euthanasia can be performed by affirmative conduct which directly causes death, or by an omission or passive conduct from which death results.[81] It is clear from cases already cited that the common law has imposed criminal liability for active euthanasia.[82] A positive act to end the life of another, such as poisoning, suffocation, or injection of medication, is as illegal for a doctor as for a layman.[83]

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quest death, and in only one of them was the defendant found guilty of first degree murder. Three defendants were acquitted by reason of insanity, three were acquitted altogether, two were found guilty of a lesser degree of homicide, and one was never indicted. Morris, *supra* note 70, at 242 n.7.

[75]Survey, *supra* note 71, at 1215.

[76]State v. Sander, (New Hampshire 1950) *discussed in* Survey, *supra* note 72, at 1214. Dr. Herman Sander injected air into his patient intravenously and charted that she died within ten minutes. *See* Survey, *supra* note 71, at 1214. In 1974, Dr. Vincent Montemarano injected potassium chloride into his unconscious patient dying of cancer of the mouth. *See* Levin & Levin, *DNR: An Objectionable Form of Euthanasia*, 49 Univ. Cin. L. Rev. 567, 575 n.70 (1980) [hereinafter cited as *DNR*].

[77]Note, *supra* note 61, at 674.

[78]*Medical Ethics: The Right to Survival, 1974: Hearing Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 9 (1974).

[79]Gurney, *supra* note 67, at 240-41; *DNR*, *supra* note 76, at 568.

[80]*DNR*, *supra* note 76, at 568.

[81]Gurney, *supra* note 67, at 235.

[82]*See* notes 61-69 *supra* and accompanying text.

[83]Elkington, *The Dying Patient, The Doctor and The Law*, 13 Vill. L. Rev. 740, 744 (1968).

Passive euthanasia, however, is culpable only under limited circumstances.[84]

The distinction between active and passive euthanasia, however, is not always clear-cut. If a patient is never placed on a mechanical ventilator and dies, this is clearly an omission. If a patient is placed on a mechanical ventilator and his physician subsequently determines that his condition is hopeless, unplugging the machine would appear to be a positive act. But, this action can also be classified as passive because the physician is omitting to provide further care.[85] Such is the construction that should be given to CPR with respect to terminally ill patients.

In contrast to active euthanasia, euthanasia by omission, or passive euthanasia, is culpable only under limited circumstances.[86] The common law has imposed criminal liability for deaths resulting from a failure to act only where the person guilty of the omission has a clear duty to act.[87] The duty owed must be "a legal duty and not a mere moral obligation. It must be a duty imposed by law or contract, and the omission to perform the duty must be the immediate and direct cause of death."[88]

A physician has no obligation to treat all prospective patients seeking medical assistance.[89] However, once he has initiated treatment, the law imposes a duty on him to continue such treatment as long as the case requires,[90] unless the patient excuses him from subsequent service, or, upon proper notice, the physician refuses to treat the patient further.[91] The doctor-patient relationship is basically contractual.[92] Unless a special agreement is expressed by the parties, the physician or surgeon impliedly contracts that he has "the reasonable and ordinary qualifications of his profession and that he will exercise reasonable skill, diligence, and care in treating the patient."[93] The physician's legal duty to his patient is sometimes

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[84]*DNR*, *supra* note 76, at 573.

[85]Foreman, *The Physician's Criminal Liability for the Practice of Euthanasia*, 27 BAYLOR L. REV. 54, 56-57 (1975).

[86]*DNR*, *supra* note 76, at 573.

[87]*See* Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367 (1965).

[88]People v. Beardsley, 150 Mich. 206, 209, 113 N.W. 1128, 1129 (1907).

[89]Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901).

[90]Ricks v. Budge, 91 Utah 307, 64 P.2d 208 (1937).

[91]Worster v. Caylor, 231 Ind. 625, 629, 110 N.E.2d 337, 339 (1953).

[92]Survey, *supra* note 71, at 1207.

[93]*Worster*, 231 Ind. at 629, 110 N.E.2d at 339. See Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 349 A.2d 245 (1975), for a discussion of the history of the strict locality rule and its evolution to the same or similar locality rule. Both rules are recognized in various states today, although ever-increasing emphasis on medical specialization has accelerated the erosion of the locality rules with a concomitant emergence of a national standard. *Id.*

couched in terms of "ordinary" care. The physician must utilize "such ordinary skill and diligence and apply the means and methods generally used by physicians and surgeons of ordinary skill and learning."[94]

While omission of ordinary medical treatment can result in physician liability because the physician has a legal duty to render such treatment, omission of extraordinary treatment should not have the same consequences. Lord Coleridge once stated that "[i]t would not be correct to say that every moral obligation is a legal duty; but every legal duty is founded upon a moral obligation."[95] Religious leaders, while condemning active euthanasia, do not advocate prolonging hopeless lives with extraordinary medical treatment.[96] Therefore, for lack of a moral obligation, it is likely that courts will agree that the physician has no legal duty to render extraordinary treatment to terminally ill patients.[97] If the court allows the motive of the physician in withholding extraordinary treatment from terminally ill patients to influence them, it is even less likely that culpability will be assigned.

To date, there have been no cases dealing with euthanasia by omission by physicians or lay persons.[98] There are no appellate cases

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[94]McHugh v. Audet, 72 F. Supp. 394, 399 (M.D. Pa. 1947).

[95]The Queen v. Instan, [1893] 1 Q.B. 450, 453, *quoted in* People v. Beardsley, 150 Mich. at 212, 113 N.W. at 1130 (1907).

[96]The duty of employing ordinary care has been recognized by the religious community. Pope Pius XII spoke to the International Congress of Anesthesiologists in November, 1957, and stated:

> Natural reason and Christian morals say that man [and whoever is entrusted with the task of caring for his fellowman] has the right and duty in case of serious illness to take the necessary treatment for the preservation of life and health . . . .
>
> But normally one is held to use only ordinary means—according to circumstances of persons, places, times and culture—that is to say, means that do not involve any grave burden on oneself or another.

Louisell, *Euthanasia and Biathanasia: On Dying and Killing*, 22 CATH. U.L. REV. 723, 734 (1973) (quoting 4 THE POPE SPEAKS 393, 395-96 (Spring 1958)). The Bishops of the Netherlands have set forth the policy that:

> [t]here is no absolute need to prolong indefinitely a life which has been despaired of, by means of medicines and machines, especially if the life in question is purely vegetal, without signs of human reaction. In the latter case above all, extraordinary means may be omitted and the natural process allowed to take its course.

Survey, *supra* note 71, at 1209.

These religious leaders have acknowledged the distinction between ordinary and extraordinary treatments. Their statements lend support to the proposition that there is no moral obligation to render extraordinary care, and that what is extraordinary care will depend on the patient and the circumstances.

[97]Foreman, *supra* note 85, at 57; Gurney, *supra* note 67, at 247-48.

[98]Fletcher, *Legal Aspects of the Decision Not to Prolong Life*, 203 J. A.M.A. 65,

to date dealing with criminal liability for failure to perform a contract for medical services.[99] However, physicians have been held civilly liable for failure to render ordinary treatment and care when they had previously accepted the patients for treatment.[100] Therefore, the crux of the problem in deciding the legality of withholding medical treatment, specifically CPR, is whether the treatment is extraordinary or ordinary for that particular patient.

B. Extraordinary-Ordinary Treatment

The distinction between ordinary and extraordinary care is not clear. It has neither been expressly recognized in case or statutory law, nor has it been adequately analyzed in legal literature.[101] One author states that the contemporary distinction between ordinary and extraordinary medical care focuses on death.[102] That is, any treatment rendered before death is ordinary care, and any treatment rendered after death is extraordinary.[103] If accepted by the courts in those states which define death only in terms of permanent cessation of brain function, this definition would require physicians to administer CPR to all patients whose heart or respirations have ceased, regardless of their medical prognosis. Failure to administer CPR would constitute withholding ordinary medical care, because the patient would not be "dead" under the brain death standard. Because a physician is under a legal duty to render ordinary care to his patients, withholding CPR would result in civil and criminal liability under the common law.[104]

Another legal commentator defines ordinary care as "those medical and surgical procedures that would normally be applied in situations not involving physically or mentally handicapped

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66 (1965). There have been cases of murder by omission involving lay persons. In general, the defendants were negligent in carrying out a legal duty owed their victims, and were found guilty. *See* State v. Behm, 72 Iowa 533, 34 N.W. 319 (1887) (a mother was convicted of manslaughter for exposing her infant child to the elements without protection); State v. Smith, 65 Me. Rep. 257 (1876) (a husband neglected to provide shelter and clothing for his insane wife, whom he left in a room without heat during winter); Territory v. Manton, 8 Mont. 95, 19 P. 387 (1888) (a husband was found guilty of manslaughter for leaving his intoxicated wife lying in the snow).

[99]Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213, 226 (1975).

[100]These abandonment cases center on patients who would have recovered normally with proper medical attention, not patients whose conditions were terminal. Survey, *supra* note 71, at 1208. *See generally* Annotation, 57 A.L.R.2d 432 (1958) (abandonment cases).

[101]Robertson, *supra* note 99, at 235.

[102]*DNR*, *supra* note 76, at 569.

[103]*Id.*

[104]*Id.* at 571.

persons."[105] This definition attempts to strictly categorize treatment modes as either ordinary or extraordinary, without considering individual patient factors. If the courts adopted this definition, physicians would be compelled to administer CPR to all patients regardless of prognosis.

The most frequently cited definitions of ordinary and extraordinary care were developed by theologians:

> Ordinary means are all medicines, treatments, and operations, which offer a reasonable hope of benefit and which can be obtained and used without excessive expense, pain, or other inconvenience. Extraordinary means are all medicines, treatments, and operations, which cannot be obtained or used without excessive expense, pain, or other inconvenience, or which, if used, would not offer a reasonable hope of benefit.[106]

Pope Pius XII stated that ordinary care will depend upon "the circumstances of person, place, times and culture."[107] This has been interpreted by some physicians to mean reasonable care.[108] While the term "reasonable" is as ambiguous as the term "ordinary," it does imply that individual patient factors should be considered in delineating the scope of ordinary care.

Although not specifically referred to in the cases, courts appear to be utilizing these latter two concepts in defining extraordinary care. That is, the courts are considering the present condition and prognosis of each patient in addition to the effect the treatment at issue will have upon the patient's condition and prognosis, sometimes called the expected benefit.

In *In re Quinlan*,[109] the New Jersey Supreme Court noted that the proliferation of modern technology has created a dilemma for the medical profession as it searches for a definitive policy on what treatments are required in the absence of legislative and judicial guidelines.[110] The court recognized that physicians have refused to prolong the death of a patient when it is clear that such "therapy" offers neither human nor humane benefit.[111] While stating that this

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[105]Robertson, *supra* note 99, at 213 n.1.

[106]*Id.* at 236 (quoting Kelly, *The Duty to Preserve Life*, 12 THEOL. STUDIES 550 (1951)). *See* Survey, *supra* note 71, at 1209.

[107]Louisell, *supra* note 96, at 734.

[108]*Moral, Ethical and Legal Questions of Extraordinary Health Care, 1975: Hearing Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 19 (1975).

[109]70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

[110]*Id.* at 47, 355 A.2d at 667.

[111]*Id.*

attitude represents a realistic perspective on the meaning of life and death, and that it is respectful of the Judeo-Christian tradition of the sacredness of human life, the court pointed out that the implementation of this attitude in the face of sophisticated, life-sustaining devices is difficult.[112] The court stated:

> For those possibly curable, such devices are of great value, and as ordinary medical procedures, are essential . . . . [T]hey are necessary because of the ethic of medical practice [healing the sick] . . . . [T]he use of the same respirator or like support could be considered "ordinary" in the context of the possibly curable patient, but "extraordinary" in the context of the forced sustaining by cardio-respiratory processes of an irreversibly doomed patient.[113]

In *Superintendent of Belchertown State School v. Saikewicz*,[114] the Supreme Judicial Court of Massachusetts evaluated multiple factors in determining whether chemotherapy should be withheld from a sixty-seven-year-old mentally retarded man with leukemia.[115] The court considered the patient's capacity to understand his present situation and prognosis, his inability to cooperate with the chemotherapy, and his inability to understand the disruption in his stable environment, as well as the invasiveness, pain potential and probable side effects of the treatment itself.[116] While not expressly stating that chemotherapy was extraordinary treatment, the court did recognize that it was a life-prolonging rather than a life-saving treatment.[117] The court stated that:

> [W]e should not use *extraordinary* means of prolonging life or its semblance when, after careful consideration, consultation and application of the most well conceived therapy it becomes apparent that there is no hope for the recovery of the patient. Recovery should not be defined simply as the ability to remain alive; it should mean life without intolerable suffering.[118]

In determining whether blood transfusions should be withheld from a mentally retarded patient with cancer of the bladder, the

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[112]*Id.* at 47-48, 355 A.2d at 667.

[113]*Id.* at 48, 355 A.2d at 667-68.

[114]373 Mass. 728, 370 N.E.2d 417 (1977).

[115]*Id.* at 731-35, 370 N.E.2d at 430-32.

[116]*Id.*, 370 N.E.2d at 430-32.

[117]*Id.* at 745, 370 N.E.2d at 428.

[118]*Id.* at 738, 370 N.E.2d at 424 (quoting Lewis, *Machine Medicine and Its Relation to the Fatally Ill*, 206 J. A.M.A. 387 (1968)).

New York Court of Appeals in *In re Storar*[119] considered the degree of pain and fear caused by the procedure and the effect of the transfusions on Storar's physical and mental status.[120] With transfusions, Storar was aware of his surroundings, recognized people familiar to him, and functioned essentially as he always had.[121] The court conceded that Storar found the transfusions disagreeable, that he could not comprehend the purpose of the treatment, and that he had to be sedated to ensure his cooperation.[122] However, the court determined that Storar's discomfort was not excessive when balanced against the benefits received from the transfusions.[123] Therefore, the appellate court overruled the lower court's decision and ordered the transfusions to continue.[124] As in *Saikewicz* and *Quinlan*, the *Storar* court weighed multiple factors in reaching its decision.

The Massachusetts Court of Appeals followed a similar pattern of reasoning in *In re Spring*.[125] Earle Spring was a seventy-eight-year-old man with organic brain syndrome and end-stage renal failure undergoing hemodialysis treatment three days a week for five hours each day.[126] His wife and son petitioned the court to have the hemodialysis treatments discontinued. In reaching its decision the lower court considered numerous factors: 1) the patient had led an active, robust, independent life prior to becoming ill; 2) he had fallen into a pitiable state of physical dependence and mental instability; 3) physicians expected no improvement in either his physical or mental condition, but instead expected further deterioration; 4) the dialysis treatments exacted a significant toll in terms of discomfort and were needed frequently for hours at a time; 5) the patient had no understanding of the nature and purpose of the treatments and was incapable of cooperating; 6) the patient's wife and son believed that the patient would not want the treatments continued under the circumstances; and 7) the attending physician recommended discontinuance of the treatment.[127] The lower court ordered the attending physician, wife, and son to decide whether to continue treatment.[128] This decision was upheld by the appellate court after a review of the same circumstances enumerated by the lower court.[129]

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[119]52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (N.Y. 1981).
[120]*Id.* at 381, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.
[121]*Id.* at 374, 375 n.5, 420 N.E.2d at 69, 70 n.5, 438 N.Y.S.2d at 271, 272 n.5.
[122]*Id.* at 375, 420 N.E.2d at 69, 438 N.Y.S.2d at 271-72.
[123]*Id.* at 381, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.
[124]*Id.* at 383, 420 N.E.2d at 74, 438 N.Y.S.2d at 276.
[125]399 N.E.2d 493 (Mass. App. Ct. 1979).
[126]*Id.* at 495.
[127]*Id.* at 498.
[128]*Id.* at 495.
[129]*Id.* at 498-504.

Prior to *Spring*, however, the Massachusetts Supreme Judicial Court had ordered dialysis treatments to be continued for the benefit of a twenty-four-year-old prisoner in *Commissioner of Correction v. Myers*.[130] Myers was in good physical and mental health except for his renal failure and was an excellent kidney transplant candidate.[131] The court determined that dialysis was "relatively painless."[132] Therefore, the court ordered hemodialysis continued over Myers' objections.[133] These two Massachusetts cases illustrate that the same type of treatment may be classified as ordinary or extraordinary depending upon the patient and his prognosis, the invasiveness, pain and potential side effects of the treatment, and the benefit expected from continuing the treatment.

While the cases in this area do not expressly refer to the treatment modes as ordinary or extraordinary, the fact that the *Quinlan*, *Saikewicz*, and *Spring* courts allowed the treatments to be withheld indicates that the courts deemed them extraordinary in nature, for physicians always have a legal duty to render ordinary care. Concomitantly, the fact that the *Myers* and *Storar* courts ordered continuance of the treatments in question indicates that those courts considered the treatments to be ordinary under the circumstances, for there is no moral or legal duty to render extraordinary care.

It has been stated that on the basis of the *Saikewicz* decision the "reasonable hope of benefit" test is not valid for determining whether care is ordinary or extraordinary.[134] However, in analyzing *Saikewicz*, *Storar*, *Spring* and *Myers*, it is clear that the courts have relied upon the "reasonable hope of benefit" test. The *Saikewicz* court firmly rejected the premise that the quality of a life equals the value of that life, but also stated that the " 'quality of life' should be understood as a reference to the continuing state of pain and disorientation precipitated by the . . . treatment."[135] Thus, the court considered the pain and other side effects of chemotherapy in addition to the potential effect of the treatment on the life of the individual.[136] The courts in *Storar*, *Spring*, and *Myers* also evaluated the benefit to be derived by the patient from the specific therapy in

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[130]399 N.E.2d 452 (Mass. 1979).

[131]*Id.* at 454.

[132]*Id.*

[133]*Id.* at 458. The lower court found that Myers' refusal of dialysis was unrelated to his disease, the nature or effects of the dialysis treatments, or any religious objection to the treatment. *Id.* at 454. "Rather, . . . Myers' refusal . . . constituted a form of protest against his placement in a medium, as opposed to a minimum security prison." *Id.* Therefore, his right to refuse treatment did not outweigh the state's interest in preserving his life and maintaining order in the prisons. *Id.* at 457.

[134]*DNR*, *supra* note 76, at 569.

[135]373 Mass. at 754, 370 N.E.2d at 432.

[136]*See* notes 115-16 *supra* and accompanying text.

question. Therefore, the "reasonable hope of benefit" test is legally valid and supported by case law.

1. The Physician's Responsibility.—Ultimately, the difference between ordinary and extraordinary treatment must be delineated by the medical profession itself.[137] This is because the physician must conform his practice of medicine to the standards of customary medical practice—a continually changing standard.[138] In each of the five cases discussed above, the courts considered expert medical testimony from the attending physicians regarding the side effects of and expected benefit from the treatments in question. Though what is ordinary or extraordinary treatment must still be decided on a case by case basis, the judicial system is gradually establishing guidelines. The cases decided after *In re Quinlan* should be reassuring to physicians, for in them the courts have followed the medical recommendations of the attending physicians.[139]

2. CPR as Extraordinary Care.—Because CPR is not considered standard or sound medical practice in patients whose cardiac or respiratory arrest occurs as the anticipated or expected end of a terminal illness,[140] it seems logical that courts will allow CPR to be withheld from terminally ill patients. The American Medical Association has stated that:

> [t]he purpose of cardiopulmonary resuscitation is the prevention of sudden, unexpected death. CPR is not indicated in certain situations such as in cases of terminal irreversible illness where death is not unexpected or where prolonged cardiac arrest dictates the futility of resuscitative efforts. Resuscitation in these circumstances may represent a positive violation of an individual's right to die with dignity.[141]

This medical philosphy of care was upheld by the Massachusetts Court of Appeals in *In re Dinnerstein*.[142] The issue in *Dinnerstein* was whether a physician attending an incompetent terminally ill patient can legally withhold CPR in the event of a cardiac or respiratory

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[137]Horan, *Euthanasia, Medical Treatment and the Mongoloid Child: Death as a Treatment of Choice*, 27 BAYLOR L. REV. 76, 82 (1975).

[138]*Id.*

[139]In *In re* Quinlan the attending physicians did not feel that Karen's condition would improve with continuing artificial ventilation. Her condition was described as a "chronic persistant vegetative state" for which there is no cure. However, the treating physicians and several other qualified experts testified that removal from the respirator would not conform to medical practices, standards and traditions. 355 A.2d at 654-55.

[140]*Standards for CPR, supra* note 43, at 864.

[141]*Id.*

[142]6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978).

arrest.[143] Shirley Dinnerstein had Alzheimer's disease, a degenerative disease of the brain, in addition to osteoporosis, coronary artery disease and hypertension.[144] Her life expectancy was no more than a year, but her attending physicians felt she could suffer a respiratory or cardiac arrest at anytime.[145] The court stated that it is within the competence of the medical, not the judicial, profession to determine what measures are necessary to ease the imminent passing of a terminally ill patient in view of the patient's history, condition and family's wishes.[146]

Even so, the court advocated consideration of the patient's present physical and mental state, his or her prognosis, and the anticipated benefit to be derived from application of treatment in deciding whether CPR is extraordinary treatment and can be withheld.[147] The court noted that "cardiac or respiratory arrest will signal the arrival of death for the overwhelming majority of persons whose lives are terminated by illness or old age."[148] Even if successful, resuscitation does not cure or abate the illnesses that brought the patients to the threshold of death and will only prolong their lives until they experience another cardiac or respiratory arrest.[149] Therefore, with respect to terminally ill patients, CPR is not a life-saving or even a life-prolonging technique in the sense that it can restore a patient to "normal, integrated, functioning, cognitive existence."[150] An analysis of these statements leads to the conclusion that CPR can be withheld from terminally ill patients as extraordinary medical treatment.

As discussed earlier, what is ordinary or extraordinary treatment for a particular patient can be determined only after considering all the circumstances concerning the patient's illness, including his present physical and mental status, his family's wishes, his medical prognosis, the hope of benefit from treatment, and relevant medical standards of care. Even CPR should be subjected to such an assessment in determining whether it is appropriate medical care for a particular patient. When the relevant standard of medical care, the poor prognosis and the lack of any real benefit are considered, it is clear that CPR for terminally ill patients is extraordinary care and can, therefore, be legally withheld.

Furthermore, when this approach is taken in determining what

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[143]*Id.* at 466, 380 N.E.2d at 134.
[144]*Id.* at 466-69, 380 N.E.2d at 134-35.
[145]*Id.* at 468, 380 N.E.2d at 135.
[146]*Id.* at 475, 380 N.E.2d at 139.
[147]*Id.*, 380 N.E.2d at 138-39.
[148]*Id.* at 470, 380 N.E.2d at 136.
[149]*Id.* at 474, 380 N.E.2d at 139.
[150]*Id.*, 380 N.E.2d at 138.

is ordinary or extraordinary care, the brain death standard will not affect the legality of the DNR order in those states which have adopted permanent cessation of brain function as a definition of death. The prognosis and present condition of the terminally ill patient does not change merely because a different criterion for determining the time of death has been adopted by a state's courts or legislature. The brain death standard neither contributes to the expected benefit to be derived from CPR for a terminal patient, nor affects the relevant medical standard of care. Thus, even under a brain death definition of death, CPR can be considered extraordinary care for terminally ill patients. While extraordinary care can theoretically be withheld without the consent of the patient because the physician has no duty to render it, from a practical standpoint, the physician should obtain the consent of the patient or ensure that it can be implied from the circumstances.[151]

C. Voluntary - Involuntary Distinction

When the patient is competent, there is clear authority that the patient has the right to withdraw consent and refuse any life-saving treatment, even when the result will be certain death and the prognosis with treatment is good.[152] This right to refuse treatment has not been limited to the terminally ill.[153] If a terminal patient is competent and able to express his wishes regarding his current and

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[151]*See* notes 152-74 *infra* and accompanying text.

[152]*See, e.g., In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (court would not override patient's religiously motivated decision to refuse blood transfusion, even though it could be considered an "unwise, foolish or ridiculous decision"); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978) (competent 72-year-old patient suffering from gangrene in both legs had right to refuse life-saving surgery where the probability of operative recovery was good and where without surgery patient would die within weeks); *In re* Nemser, 51 Misc. 2d 616, 273 N.Y.S.2d 624 (Sup. Ct. 1966) (court refused to order amputation of leg of elderly woman where there was conflicting medical opinion whether the amputation would kill, cure or lead to further surgery); Erikson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962) (court would not order blood transfusions for Jehovah Witness who consented to surgery but refused any transfusions); *In re* Yetter, 62 Pa. D. & C.2d 619 (Northhampton County Ct. 1973), *discussed in* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 3 (1975) (court upholds patient's decision to refuse breast biopsy and possible cancer surgery). *See generally* Byrn, *supra*.

[153]*See* note 152 *supra*. While the state does have an interest in protecting the life of the individual, individuals have a constitutional right to privacy which may be asserted to prevent unwanted infringements on bodily integrity. *In re* Spring, 399 N.E.2d at 455-56. As with all other rights, the individual's right to privacy is not absolute and must be balanced against countervailing state interests; that is, the preservation of life, the prevention of suicide, the protection of the interests of innocent third parties, and the maintenance of the ethical integrity of the medical profession. *Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

future medical treatment, the physician has the duty to inform the patient of his condition, prognosis and treatment alternatives.[154] The competent patient's informed refusal of any ordinary or extraordinary measure is a legally supported decision.

Problems arise when a patient has never been competent because of age, mental illness, or retardation and when a patient who was competent at one time becomes incompetent due to his disease process, medication, or age.[155] The court in *Saikewicz* stated that "[t]o protect the incompetent person . . . the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons." [156] In protecting the incompetent's right to life, courts have overruled objections to life-saving treatment, particularly when the chances for recovery have been great and the degree of bodily invasion relatively minor.[157] With regard to treatment that is at best life-prolonging, traditional medical practice has been to defer to the wishes of family members, who, in all likelihood, will be greatly influenced by the physician's recommendations.[158] The judicial system, however, has been involved in such decision making for the incompetent patient with increasing frequency over the last few years.[159]

The case of Karen Ann Quinlan was the first case to recognize the

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[154]The doctrine of informed consent requires that every competent adult patient be given information on the possible risks and benefits involved in proposed medical treatment. The patient must consent before treatment is rendered. *See* Comment, *Informed Consent for the Terminal Patient*, 27 BAYLOR L. REV. 111 (1975).

[155]Several states have enacted living will statutes which may cover this situation if all provisions are met. *See generally* Note, *Rejection of Extraordinary Medical Care by a Terminal Patient: A Proposed Living Will Statute*, 64 IOWA L. REV. 573 (1979); Note, *Death With Dignity and the Terminally Ill: The Need for Legislative Action*, 4 NOVA L.J. 257 (1980); Note, *The Kansas Natural Death Act*, 19 WASHBURN L.J. 519 (1980).

[156]373 Mass. at 746, 370 N.E.2d at 428.

[157]*See, e.g., In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (Ch. Div. 1977) (court appointed special guardian to consent to emergency, life-saving amputation for a 67-year-old patient suffering from diabetes and arteriosclerosis); Long Island Jewish-Hillside Med. Center v. Levitt, 73 Misc. 2d 395, 342 N.Y.S.2d 356 (Sup. Ct. 1973) (court appointed relative as guardian and ordered life-saving amputation for an 84-year-old patient considered a good surgical risk); State Dep't of Human Servs. v. Northern, 563 S.W.2d 197 (Tenn. Ct. App.), *cert. denied*, 436 U.S. 923 (1978) (court rejected 72-year-old incompetent patient's request to grant stay of lower court order authorizing life-saving amputation).

[158]Relman, *The Saikewicz Decision: Judges as Physicians*, 298 NEW ENG. J. MED. 508, 509 (1978).

[159]*See, e.g., In re* Spring, 399 N.E.2d 493 (Mass. App. Ct. 1979); *In re* Dinnerstein, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

right to withhold life-sustaining treatment from an incompetent individual. The New Jersey Supreme Court focused on Karen's medical prognosis in reaching its decision. She was "in a chronic persistent vegetative state," unlikely to ever regain consciousness, with no known treatment likely to cure or improve her condition.[160] The New Jersey court preferred that the decision to withhold life-prolonging treatment remain with the physician and the family,[161] but required concurrence by a hospital ethics committee before life-sustaining measures could be withdrawn.[162] The court rejected the judiciary making such decisions, characterizing such involvement as a "gratuitous encroachment upon the medical profession's field of competence,"[163] in addition to being "impossibly cumbersome."[164]

The Massachusetts Supreme Judicial Court in the *Saikewicz* case disagreed with the New Jersey decision. The court stated:

> We do not view the judicial resolution of this most difficult and awesome question—whether potentially life-prolonging treatment should be withheld from a person incapable of making his own decision—as constituting a "gratuitous encroachment" on the domain of medical expertise. Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and is not to be entrusted to any other group purporting to represent the "morality and conscience of our society," no matter how highly motivated . . . .[165]

In *Saikewicz*, the Massachusetts Supreme Judicial Court employed the "substituted judgment" test to determine what Saikewicz himself would have wanted. The common law doctrine of substituted judgment has long been used to allow courts and guardians to make a variety of decisions for an incompetent.[166] In utilizing the substi-

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[160]70 N.J. at 24-26, 355 A.2d at 654-55.

[161]*Id.* at 54, 355 A.2d at 671. Karen had made statements before becoming ill that she did not want to be maintained on a ventilator in a vegetative state. These statements were of no consequence to the courts' opinion as both courts decided that the statements lacked probative weight because of their remoteness from an actual situation. *Id.* at 21-22, 355 A.2d at 653.

[162]The ethics committee was seen as serving several purposes: 1) procedural safeguard for the incompetent, 2) an insurer that no civil or criminal liability would arise, and 3) a method of diffusing responsibility. *Id.* at 54, 355 A.2d at 671.

[163]*Id.* at 50, 355 A.2d at 669.

[164]*Id.*

[165]373 Mass. at 759, 370 N.E.2d at 435.

[166]*See generally* Schultz, Swartz & Appelbaum, *Deciding Right-To-Die Cases Involving Incompetent Patients: Jones v. Saikewicz*, 11 SUFFOLK U.L. REV. 936 (1977).

tuted judgment test, the court substitutes its judgment for that of the incompetent person. According to *Saikewicz*, the court order should read that the probate judge is "satisfied that the incompetent individual would . . . have chosen to forego potentially life-prolonging treatment . . . ."[167] If the judge is not so persuaded, or finds that the interests of the state require it, then treatment will be ordered.[168] The medical community was affronted by the court's opinion, which in fact declared that routine medical decisions could be reviewed by the courts.[169] Unfortunately, the court's language was misconstrued to mean that every life or death decision needs to be overseen by a court of law. The Massachusetts Court of Appeals attempted to clarify this issue in *In re Dinnerstein*.

In *Dinnerstein*, the court held that the *Saikewicz* decision requiring court determination before treatment can be withheld from an incompetent patient did not apply to withholding CPR from terminally ill patients. The court stated:

> [T]he *Saikewicz* case, if read to apply to the natural death of a terminally ill patient by cardiac or respiratory arrest, would require attempts to resuscitate dying patients in most cases, without exercise of medical judgment, even when that course of action could aptly be described as a pointless, even cruel prolongation of the act of dying.[170]

The *Dinnerstein* court felt that *Saikewicz* is relevant only when death is not imminent and the treatment in question offers a life-prolonging or life-saving alternative.[171] A life-prolonging treatment does more than merely suspend the act of dying. At the very least it provides a remission of symptoms enabling a return towards "a normal, functioning, integrated existence."[172] Therefore, the *Dinnerstein* court, like the *Quinlan* court, affirmed that decisions based solely on medical prognosis are to be made by the physician with the approval of the patient's family. "[W]hat measures are appropriate to ease the imminent passing of an irreversibly, terminally ill patient" is a medical decision, not a judicial one.[173] The physician's decision is subject to court review only to the extent that he may have negligently failed to exercise the degree of care expected from an average, qualified practitioner.[174]

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[167]373 Mass. at 757, 370 N.E.2d at 434.

[168]*Id.*

[169]Baron, *supra* note 55, at 115-16; Curran, *supra* note 55, at 500.

[170]6 Mass. App. Ct. at 473, 380 N.E.2d at 137.

[171]*Id.* at 474, 380 N.E.2d at 138.

[172]*Id.*

[173]*Id.*, 380 N.E.2d at 139.

[174]*Id.*

D. Summarizing Physician Liability

It is evident that a positive act to end a person's life is as illegal for a physician as it is for a layman, whether the act is performed at the request of the patient or not.[175] Active euthanasia can result in civil and criminal liability. It is equally evident that neither civil nor criminal liability attaches for withholding ordinary or extraordinary medical treatment if the patient consents to the withholding in agreement with the physician, or refuses recommended treatment in the exercise of his right to privacy.[176] Absent a patient's refusal of ordinary care, however, the physician is legally obligated to render that care as part of his professional contract with the patient.[177] Such is the standard of care to which physicians are held. Failure to render ordinary treatment to either an incompetent or competent patient can result in criminal liability as well as civil liability under negligence and abandonment theories.[178] Withholding extraordinary treatment from the incompetent patient, however, remains a cloudy area of the law.[179] There is no moral duty to render extraordinary care and because legal duties generally are founded on moral obligation,[180] there is no legal duty to render extraordinary care. Therefore, determining which treatments are ordinary and which are extraordinary becomes crucial in determining legal liability.

This distinction must be drawn on a patient by patient basis, for what may be ordinary treatment for one person may indeed be extraordinary for another.[181] It is evident from the cases that courts are employing the "reasonable hope of benefit" test and evaluating

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[175]*See* notes 64-69 *supra* and accompanying text.

[176]*See* notes 152-55 *supra* and accompanying text.

[177]*See* notes 89-94 *supra* and accompanying text.

[178]*Id.*

[179]This chart presents a comprehensive summary of the law:

Patient Acquiescence	Physician's Act	Degree of Care	Liability
Voluntary	Positive Act		Civil and Criminal Liability
Involuntary			
Voluntary (includes refusal)	Passive (withholding)	Ordinary	No Liability
		Extraordinary	
Involuntary	Passive (withholding)	Ordinary	Civil and Criminal Liability
		Extraordinary	?

[180]*See* notes 95-97 *supra* and accompanying text.

[181]*See In re* Quinlan, 70 N.J. at 48, 355 A.2d at 668.

multiple patient factors in deciding what treatment is extraordinary and therefore can be withheld.[182] The primary factors to be considered include the patient's prognosis, his present physical and mental status, the expected benefit to be derived from the treatment in question, and the standard of customary medical practice.[183] When applicable, family wishes, the patient's ability to understand the need for and to cooperate with the treatment, as well as the invasiveness, pain potential and side effects of the treatment itself should be evaluated.[184] In short, all circumstances bearing on the patient and the treatment are to be considered.

While the status of other treatments, such as hemodialysis or chemotherapy, may be in question, the legal status of CPR in relation to the terminally ill patient has been delineated by the Massachusetts Court of Appeals in *In re Dinnerstein*. The court held that CPR is extraordinary treatment for terminally ill patients and can be withheld without fear of liability.[185] If the terminally ill patient is competent, obviously his wishes for treatment will be controlling. If a patient is incompetent, however, the decision-maker must evaluate the previously defined factors. A terminally ill patient's prognosis is hopeless; he is not going to improve. Therefore, CPR is not going to afford him any benefit. Because the ethic of the medical profession includes healing and providing comfort for the sick, it is likely that a terminal patient's physical condition would be quite debilitated at the time medical practitioners determine that CPR is no longer appropriate for the patient. The American Medical Association has set forth the purpose for which CPR has been developed and states that resuscitating terminally ill patients is not sound medical practice.[186]

Individual states addressing the issue have reached differing conclusions as to whether the courts need to be involved in decisions regarding withdrawal or withholding of life-prolonging treatment from incompetent patients. However, while the *Dinnerstein* court was adamant that the courtroom was the appropriate forum for selecting meaningful life-prolonging treatment alternatives, it held that whether to initiate CPR in terminally ill patients was strictly a medical decision to be made in conjunction with the patient's family.[187] Prior judicial approval is not needed to withhold CPR from terminally ill patients because it is not meaningful treatment for

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[182]*See* notes 101-51 *supra* and accompanying text.

[183]*See* notes 114-36 *supra* and accompanying text.

[184]*Id.*

[185]6 Mass. App. Ct. at 466, 380 N.E.2d 134.

[186]*Standards for CPR*, *supra* note 43, at 864.

[187]6 Mass. App. Ct. at 474, 380 N.E.2d at 139.

this group of patients.[188] This indicates that while physicians should consult with family members about a DNR order, resorting to the courts is unnecessary if all are in agreement.

Massachusetts has not adopted a brain death standard of death to date. Therefore, states that have not yet adopted brain death as a definition of death can look directly to the Massachusetts case of *In re Dinnerstein* for guidance on the DNR issue. When patients are terminally ill, CPR can be withheld as extraordinary treatment without fear of liability if the physician and family members agree that this is appropriate.

Montana, Arkansas and Tennessee have statutes defining death only in terms of permanent cessation of brain function and activity.[189] However, the traditional definition of death has not been eliminated by the brain death statutes or judicially abrogated in any of these states. If the courts in these states adopt the definition of extraordinary care as treatment rendered only after death, then having the brain death standard alone possibly could create a higher standard of care for physicians.[190] If a person is not dead until all brain function has ceased, then he is still "alive" for a brief period of time after his heart and respirations have arrested. During this time, which is going to vary with each individual, all possible treatments, including CPR, would be ordinary and physicians would have a legal duty to render that care.

If, however, the courts in these three states follow the guidelines established by other courts and, in determining what is ordinary and extraordinary care, evaluate multiple factors, including patient prognosis and the expected benefit of treatment, then CPR for terminally ill patients will be extraordinary treatment. The prognosis and present condition of the terminally ill patient does not improve merely because a different criterion for determining the time of death has been adopted. Additionally, the brain death standard neither contributes to the expected benefit to be derived from CPR for a terminal patient, nor affects the usual standard of medical care. More importantly, it is likely that these courts would retain the traditional definition of death, that is, cessation of heartbeat and respirations, if presented with the issue because it was not specifically eliminated by the statute.

Furthermore, the majority of states have expressly retained the traditional criteria for defining death in their death definition statutes, and numerous organizations recommend this approach.[191]

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[188] *Id.*

[189] *See* note 38 *supra* and accompanying text.

[190] *DNR*, *supra* note 76, at 571.

[191] *See* note 38 *supra.*

Although some writers find this situation confusing, in ordinary situations the traditional criteria should be adequate for determining death.[192] The brain death standard comes into play only when the patient has suffered severe brain damage from one of many causes.[193] Therefore, even in states enunciating only a brain death definition in their statutes, CPR for terminally ill patients should be classified as extraordinary treatment whether extraordinary treatment is determined by evaluating individual patient factors or by drawing a line at death. Thus, even in these states there should be no physician liability for failure to resuscitate terminally ill patients.

In states which have expressly retained the traditional definition of death in addition to adopting a brain death definition, CPR for terminally ill patients is extraordinary care if the standards for determining extraordinary care as set forth in this Note are adopted, or if courts draw the ordinary-extraordinary line at death. Furthermore, Kansas and states which choose to model their definition of death statutes after the Kansas statute expressly provide immunity for physicians who have not rendered CPR to the terminally ill. The statute states in part that "[a] person will be considered medically and legally dead if, . . . there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused . . . these functions to cease, . . . attempts at resuscitation are considered hopeless."[194] Thus, with the legality of the DNR order recognized by the legislature, administering CPR becomes a purely medical decision, "based on ordinary standards of medical practice."[195]

VI. CONCLUSION

As long as courts continue to classify medical treatment as extraordinary or ordinary on the basis of individual patient factors and circumstances, CPR for terminally ill patients will remain extraordinary treatment. This group of patients does not benefit from resuscitative measures; CPR does not provide them meaningful prolongation of life. The brain death standard does not alter the uselessness of this technological advance for terminally ill patients. Therefore, physicians may withhold CPR from a competent terminally ill patient with that patient's consent, or from an incompetent terminally ill patient with the consent of the family. While concurrence by hospital ethics committees may be morally and ethically ad-

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[192]Ufford, *supra* note 8, at 231.

[193]Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *supra* note 6.

[194]KAN. STAT. ANN. § 77-202 (Supp. 1979). See note 38 *supra* for the full text.

[195]*Id.*

visable, such a requirement has not yet been imposed on the medical profession. The *Quinlan* court required the agreement of the ethics committee for actively removing life-support systems from the patient. The *Dinnerstein* court emphasized that the *Saikewicz* decision mandating judicial review of medical decisions to withhold medical treatment applies only when death is not imminent. Therefore, familial consent is sufficient at this time for withholding CPR from incompetent terminally ill patients.

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